

# Ante-Mortem Probate: A Viable Alternative

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## I. INTRODUCTION

Most jurisdictions within the United States currently utilize the post-mortem model of probate. Under this theory, an individual of legal age and of sufficient mental health plans for the distribution of his bounty at death, apportioning shares to individuals or organizations that he feels are most deserving. These generous intentions are then formalized by being scribed into his last will and testament, which is stored in a safe and often secret place. The will awaits the death of its writer so that at the time of probate, it can be read once again to proclaim donative intent and assure that the estate is distributed in accordance with the testator's desires. While this theory of probate sounds quite proper, experience has revealed that in many cases it serves only to destroy the very intentions which it is designed to protect. Post-mortem probate provides a feeding ground for spurious will contests which eat away the corpus of an estate no longer protected by the evidentiary power that lies buried with the testator.

An alternative to post-mortem probate is to validate the testator's will during the testator's lifetime. This is known as ante-mortem or living probate. Although some believe ante-mortem probate is a controversial solution to the difficulties encountered with post-mortem probate, ante-mortem probate has roots reaching as far back as the biblical era. In addition, it was first implemented in the United States, albeit unsuccessfully, in the late nineteenth century. This article will discuss the problems with post-mortem probate and will demonstrate that conventional techniques fail to adequately resolve these difficulties. The evolution of ante-mortem probate which lead to the three modern models of ante-mortem probate will be described. Attention will then turn to the three states which have ante-mortem statutes and the unsuccessful effort of the National Conference of Commissioners on Uniform State Laws to approve a uniform act. Finally, the authors will urge that ante-mortem probate be given serious consideration because it has significant benefits while its potential problems can be surmounted or counterbalanced.

From the outset, readers should be aware that the purpose of this article is neither to suggest that the post-mortem model of probate be abolished nor that ante-mortem probate

is a panacea. Rather, it is to demonstrate that ante-mortem probate is a viable technique which could serve to reduce the problematic side of the current post-mortem system and provide a wide range of benefits to a significant segment of the public.

## II. INADEQUACY OF POST-MORTEM PROBATE

### A. Difficulties with Post-Mortem Probate

There are three basic areas which demonstrate the flaws in any post-mortem probate system: the encouragement of spurious will contests, the frustration of the testator's intent, and the creation of significant evidentiary problems. Although these areas are discussed separately, they cannot be truly compartmentalized. In addition, other difficulties are subsumed in these three categories, such as the tremendous wasting of court time and estate resources which occurs whenever probate matters are disputed on artificial grounds.

#### 1. Encouraging Spurious Will Contests

*[T]he post mortem squabbings and contests on mental condition . . . have made a will the least secure of all human dealings, and made it doubtful whether in some regions insanity is not accepted as the normal condition of testators.<sup>1</sup>*

One of the major purposes of a post-mortem will contest is to ensure that deserving heirs do not lose their portion of a decedent's estate as a result of fraud, improper influence, or insufficient capacity which may have affected the decedent at the time he executed his will.<sup>2</sup> Synthesized by the greedy plots of disgruntled devisees and disinherited heirs, however, the will contest has taken on several new dimensions. These include attempts to prove lack of mental capacity, fraud, or improper influence where none existed for the sole purpose of

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1. Lloyd v. Wayne Circuit Judge, 56 Mich. 236, 242, 23 N.W. 28, 30 (1885).

2. Wilson v. Kemp, 7 Ark. App. 44, 51, 644 S.W.2d 306, 310 (1982) (the probate court has duty to preserve interest of those who are or who may become beneficiaries of decedent's estate); Will of Wharton, 114 Misc. 2d 1017, —, 453 N.Y.S.2d 308, 311 (1982) (the purpose of probate is to distribute assets according to testator's intentions only if testator is free from restraint, has testamentary capacity, and is otherwise competent). Cf. Palazzi v. Estate of Gardner, 32 Ohio St. 3d 169, —, 512 N.E.2d 971, 974 (1987) (the ability to contest will constitutes constitutionally protected interest).

taking a greater share of the bounty. These apocryphal challenges to the integrity of the testator place tremendous financial strain on the corpus of the estate and, to prevent total depletion, are often settled out of court. Because of the extra-tribunal nature of these settlements, their consuming effect is seldom recorded, making the extent of their thievery difficult to determine; however, everyday knowledge and experience suggests that this practice is widespread.<sup>3</sup>

Under the majority of post-mortem procedures, the plaintiff, after losing a spurious will contest, is not required to reimburse the decedent's estate for attorney's fees and court costs expended while defending the unjustified claim.<sup>4</sup> This practice encourages a potential heir to attempt to "strike it rich" because even if the attack is unsuccessful, the penalty suffered will be little more than disappointment.<sup>5</sup>

While monetary gain is generally the motivating factor behind spurious will contests, another common factor, even more morally abhorrent, is the desire of a disinherited relative to embarrass and tarnish the actions of the testator and his family with the proverbial skeletons which are pulled from the family closet during capacity litigation.<sup>6</sup> The adoption of some type of ante-mortem probate could work in conjunction with current post-mortem procedures to effectively carry out

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3. See, e.g., Letter to the Missouri Bar Association (June 29, 1933), *reprinted in* 4 Mo. B.J. 110 (1933); N.Y. Times, Mar. 24, 1931, at 54, col. 4; N.Y. Times, June 30, 1933, at 19, col. 6.

4. See, e.g., *Hall v. Cole*, 412 U.S. 1, 4 n.4 (1973); *Succession of Montegut*, 508 So. 2d 892, 896 (La. App. 1987) (no valid claim for damages for frivolous challenge unless filed solely for delay or without sincere belief of meritorious challenge); *In re Estate of Nelson*, 281 N.W.2d 245, 250 (N.D. 1979) (costs and attorneys fee's recoverable from will contestants where challenge was made without reasonable cause, not in good faith and found to be untrue); see also *In re Estate of Kern*, 239 Kan. 8, 716 P.2d 528, 538 (1986) (beneficiaries not entitled to recover attorney's fees where contest is not frivolous). Cf. N.Y. SURR. CT. PROC. ACT LAW § 2302(3)(a) (McKinney Supp. 1989) (an unsuccessful claimant may be required to pay costs); TENN. CODE ANN. § 32-4-101 (1984) (contestant is required to post bond to secure payment of costs if unsuccessful); WIS. STAT. ANN. § 879.33 (West Supp. 1988) (losing party may be required to pay costs).

5. See Comment, *The Ante Mortem Alternative to Probate Legislation in Ohio*, 9 CAP. U.L. REV. 717, 719 (1980) (a will challenger possesses evidentiary advantages because the burden of proving a will's validity lies in its proponent).

6. *Id.* at 719 n.19 (an argument could be made that such motivation is void as against public policy).

the intent of the decedent, while protecting against overcrowding the courts with unfounded litigation.

## 2. Frustrating the Testator's Intent

The primary function of testamentary law is to maintain efficient procedures for the transfer of the testator's property at the time of his death in accordance with his intentions.<sup>7</sup> A will is designed to disrupt the usual flow of property established by law from the testator to his next of kin.<sup>8</sup> Because a will often transfers property to a specific person, it may be considered a type of conveyance allowing the decedent to enjoy final control of the disposition of his estate.<sup>9</sup> The ability to convey one's property is a right which every property owner normally enjoys during his life and, by use of a will, expects to have upon his death. Therefore, a person anticipates having sole control—both before and after death—over the disposition of his property.<sup>10</sup> Few would argue with the premise that any legal technique that tends to thwart this basic right of ownership is in some way defective.

Post-mortem probate allows a will to be invalidated by reason of a pure technical error such as defective signatures or attestation.<sup>11</sup> Probate is necessary to test a will's validity and to prove its authenticity.<sup>12</sup> However, testing the validity of the instrument after the testator's death is the most illogical and impractical time for such scrutiny because even the simplest of errors have the unavoidable effect of destroying the validity of a will and upsetting the testator's intentions.<sup>13</sup>

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7. See Cavers, *Ante Mortem Probate: An Essay In Preventive Law*, 1 U. CHI. L. REV. 440, 440 (1934).

8. See Redfearn, *Ante-Mortem Probate*, 38 COM. L.J. 571, 571 (1933) (property transferred by will is analogous to conveyance but the instrument must first be proved to be valid before the transfer is effective).

9. *Id.*

10. See *Banks v. Goodfellow*, 5 Q.B. 549, 564 (1870) ("power of disposing of property in anticipation of death has ever [sic] been regarded as one of the most valuable of the rights incidental to property"); Cavers, *supra* note 7, at 445 (essence of will continues power of conveyance).

11. See Redfearn, *supra* note 8, at 572 (the most common causes for will contests are attestation errors, forgery, undue influence, lack of testamentary capacity, and existence or conduct of potential heir). See *infra* note 13.

12. *Id.* at 571.

13. *Id.*; see also *Orrell v. Cochran*, 695 S.W.2d 552, 552 (Tex. 1985) (the signature of a testator on self-proving affidavit rather than on the will invalidated the will); Boren

No matter how sane, competent, and lucid a testator may be or how strong his desire that his estate be administered by trusted persons, our current system of post-mortem probate cannot guarantee a testator that his intentions and instructions will be carried out in spite of all the expense and caution exerted.<sup>14</sup> The post-mortem probate system does not offer a true and effective method to probate a will nor does it test the validity of the intentions expressed within it because the best evidence, the testimony of the testator, is unavailable.<sup>15</sup> Post-mortem probate creates a situation in which excluded heirs are invited to challenge the will and use the testator's expressed intentions to destroy the instrument, question the giver's sanity, and line their own pockets with property that was never intended to be theirs.<sup>16</sup> Post-mortem probate law is encumbered with antiquated presumptions, procedures, and traditions, which by resisting statutory alteration, are sure to frustrate testamentary intent and reveal with shining clarity the need for an alternative.<sup>17</sup>

Under the post-mortem system, judges and jurors often evaluate the testator's scheme by their own standards of what a fair and normal distribution should be.<sup>18</sup> This procedure has

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v. Boren, 402 S.W.2d 728, 729-30 (Tex. 1966) (signatures of witnesses on self-proving affidavit rather than on will invalidated will). *But cf.* Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) ("insistent formalism of the law of wills is mistaken and needless").

14. See Redfearn, *supra* note 8, at 571 (voidness of will due to simple mistake is an unreasonable solution); Comment, *supra* note 5, at 717-18 (testator's fear that testamentary disposition of property will not be by his expressed intent calls into question the ability of probate law to fulfill its purpose and function).

15. See Redfearn, *supra* note 8, at 571.

16. See Fink, *Ante-Mortem Probate Revisited: Can An Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 265-66 n.1 (1976) (provides examples of will contests brought by unscrupulous heirs).

17. See Langbein, *supra* note 13, at 489 (any formal defect found in a will causes it to fail despite voluminous evidence that defect was inconsequential); Comment, *Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives*, 32 CASE W. RES. 823, 825 (1982) (ante-mortem probate provides solutions to post-mortem quandaries such as testator's intent and capacity as well as attorney malpractice).

18. See Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1070 (1980); North Carolina Nat'l Bank v. Goode, 298 N.C. 485, —, 259 S.E.2d 288, 292 (1979) (the court presumed distributive scheme which lessened federal taxes); *In re Estate of Khadad*, 135 Misc. 2d 67, —, 514 N.Y.S.2d 625, 627-28 (1987) (the court construed will as benefitting surviving spouse by allowing maximum marital deduction). *But see* Chicago Title & Trust Co. v. Schwartz, 120 Ill. App. 3d 324, —, 458 N.E.2d

the effect of subjecting testamentary transfers to meticulous examination when the same transaction, if done *inter vivos*, would hardly have been questioned.<sup>19</sup> The paradox existing between *inter vivos* and testamentary transfers strongly suggests that post-mortem probate fails to protect not only the testator's intent, but also the basic rights and principles associated with the ownership of property.<sup>20</sup> This paradox between *inter vivos* and testamentary transfers can be easily illustrated with stories in which wealthy testators intend that their bounty be devised to deserving charitable organizations only to become the subject of ridicule and accusation at the hands of their heirs and devisees.<sup>21</sup>

Under the ante-mortem alternative the deceased testator could receive the same level of respect given him while alive. Furthermore, the testator could ensure that the intent expressed in his will would be as secure as that of any competent person recorded in an error-free medium.

### 3. Creating Significant Evidentiary Problems

One of the recurring problems with post-mortem probate is that the trier of fact must determine the condition of the testator's mind and the validity of the will by making inferences from evidence of past conduct and circumstances surrounding the testator. The evidentiary problems are both complex and numerous because the testator is dead and cannot testify as to his true intent. Only indirect evidence is available to test his capacity which, whether he was a mad-

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151, 154 (1983) (a court may not alter scheme of distribution even if it is illogical or peculiar where it is not contrary to clear intent of testator).

19. Comment, *supra* note 5, at 718 (failure of testamentary law to fulfill testators' desires causes testators to deplete their estates).

20. See Taft, *Comments on Will Contests in New York*, 30 YALE L.J. 593, 606 (1921) (wills are scrutinized even though the person's capacity to make deed or contract would not be questioned if he or she were alive thus interfering with owner's right to transfer property to desired person).

21. See Fink, *supra* note 16, at 265-66 n.1 (provides examples of will contests by desperate heirs); see also *Baliles v. Miller*, 231 Va. 48, —, 340 S.E.2d 805, 810 (1986) (heirs argue against applying *cy pres* doctrine or implied trust to vague charitable bequest); *In re Will of McCarthy*, 49 A.D.2d 204, —, 374 N.Y.S.2d 203, 208-09 (1975) (the court prevented lapse of gift to convent no longer in existence); *Succession of Sturgis*, 516 So. 2d 1293, 1298 (La. App. 1987) (questionable claim of perpetual drunkenness of testator as challenge to will containing charitable bequest).



man or simply eccentric with his property, tends to be a matter of mere speculation. In addition, the quality of any evidence, particularly recollection, deteriorates with time.<sup>22</sup>

These evidentiary problems encourage and provide an advantage to spurious will contests. For example, in *Hickman v. Hickman*,<sup>23</sup> a Texas court stated that a will which failed to provide for the testator's wife and child supported the jury finding of insufficient mental capacity despite numerous witnesses' testimony that the testator was of sound mind at the time the will was executed.<sup>24</sup>

Some attention must be given to the evidentiary advantages that the contestants to a post-mortem procedure enjoy which encourage spurious challenges to a will's validity.<sup>25</sup> Any litigation is a financial burden on the estate and on the rightful beneficiaries, particularly if the estate pays the cost of litigation for unsuccessful challenges.<sup>26</sup> This financial burden has a tendency to force settlements of unfounded challenges.<sup>27</sup> Furthermore, the burden is on the proponent of the will to prove capacity.<sup>28</sup> However, the star witness, the testator, is

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22. See McCrystal & Maschari, *Will Electronic Technology Take the Witness Stand?*, 11 U. TOL. L. REV. 239, 249-52 (1980) (potential inaccuracies of human memory create inconsistencies, bias, prejudice, and inaccuracy which slow the administration of justice).

23. 244 S.W.2d 681 (Tex. Civ. App. 1951).

24. *Id.* at 683-84.

25. See Comment, *supra* note 5, at 718-19 (post-mortem probate poses evidentiary problems of placing the testator's testimony beyond the court's reach and deterioration of witnesses' recollection of events surrounding execution of will).

26. See Cahn, *Undue Influence and Captation—A Comparative Study*, 8 TUL. L. REV. 507, 517 (1934) (fees and expenses of contested probate proceedings are tacked to testator's estate while rarely imposed on unsuccessful contestants); Comment, *supra* note 5, at 719 (despite spurious nature of contestant's claim to will's validity, monetary burden of litigation traditionally falls upon estate leaving the unsuccessful challenger only disappointed).

27. See Cavers, *supra* note 7, at 443 n.10 (although elderly New York recluse left no relatives, 2,360 people attempted to establish themselves as heirs with some individuals related in the fifth degree settling for \$2,000,000 not to contest will).

28. See, e.g., *Cushman v. Nichols*, 20 Mass. App. 980, —, 482 N.E.2d 862, 864 (1985) (the proponent has ultimate burden of proving testamentary capacity); *Estate of Jenks*, 291 Minn. 138, —, 189 N.W.2d 695, 698 (1971) (the burden of proving mental capacity rests with proponent of will); *Estate of Kumstar*, 66 N.Y.2d 691, —, 496 N.Y.S. 414, —, 487 N.E.2d 271, 272 (1985) (the proponent of will has burden of proving testamentary capacity); *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983) (the burden of proving capacity is on proponent). But see, e.g., *Sessions v. Handley*, 470 So. 2d 1164, 1167 (Ala. 1985) (the contestant has burden of proving lack of testamentary

unable to present his proof personally.<sup>29</sup> Similarly, because of the length of time that normally elapses between the execution of a will and its subsequent challenge, witnesses necessary to prove the testator's capacity may no longer be available.<sup>30</sup> The ante-mortem probate alternative would significantly reduce the evidentiary problems found in post-mortem systems.

A living probate system allows a court to evaluate testamentary capacity while the testator is still alive to present his evidence.<sup>31</sup> An ante-mortem approach would prevent the court and jury from being swayed by their own perceptions of the inequitable treatment of the disinherited kin.<sup>32</sup> Other advantages which stem from using ante-mortem techniques include: 1) evidence could be presented in a non-adversarial context under some models;<sup>33</sup> 2) the testator would be available to the court to eliminate ambiguous silence; 3) the circumstances of disinheritance could be explored beyond the realm of mere conjecture;<sup>34</sup> and 4) the heirs apparent must choose to contest the will earlier than is in their interest to do

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capacity based on presumption of capacity to make a will); Succession of Lyons, 452 So. 2d 1161, 1164 (La. 1984) (the burden of proving lack of capacity is on party so alleging); Estate of Kesler, 702 P.2d 86, 88 (Utah 1985) (contestant has burden of proving testamentary incapacity).

29. See Comment, *supra* note 5, at 717-19 (post-mortem probate poses problems of its inability to guarantee testator's desires, deteriorating evidence, and spurious challenges, all of which could be remedied by allowing testator to testify in ante-mortem proceeding).

30. *Id.* at 718-19.

31. *Id.*

32. See Redfearn, *supra* note 8, at 572 (disinherited heirs would be cautious to challenge testator's devise if they knew testator would rebut their challenge face-to-face); see also *Armstrong v. Butler*, 262 Ark. 31, 41, 553 S.W.2d 453, 458 (1977) (presumption against disinheritance of lineal descendants); *Trust Co. Bank v. First Nat'l Bank*, 246 Ga. 222, —, 271 S.E.2d 141, 143 (1980) (where unclear, presumption that testator intended to pass property within bloodline); *Estate of McAfee*, 463 Pa. 250, —, 344 A.2d 817, 819 (1975) (will interpreted to conform most nearly with intestate laws where ambiguity exists); *Porter v. Porter*, 286 N.W.2d 649, 655-56 (Iowa 1979) (will construed in favor of following laws of descent and distribution unless clear indication of disinheritance).

33. See Redfearn, *supra* note 8, at 572 (the purpose of ante-mortem probate is to establish will's validity during testator's lifetime rendering negatory challenges to will's validity which are meant to disavow and destroy testator's intent).

34. See Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 67-68 (1978) (testator would be expressly cautioned about seriousness and irregularity of projected disinheritance and asked to explain his reasons at or before the execution ceremony to preserve superior evidence of capacity).

so, thus, alleviating any speculation as to their designs. In sum, ante-mortem probate offers evidentiary advantages unequalled by its post-mortem counterpart.

## B. Failure of Conventional Techniques to Adequately Resolve Post-Mortem Difficulties

There are four conventional techniques which have attempted to resolve the problems with post-mortem probate: non-probate transfers, self-proved wills, in terrorem clauses, and videotaped will execution ceremonies. However, none of these techniques are a substitute for ante-mortem probate.

### 1. Non-Probate Transfers

Many testators frightened by the prospect of leaving their families and estates subject to the roulette wheel of post-mortem probate use other means to divest their fortunes in order to avoid probate altogether. At least one commentator has recommended that such techniques should be chosen over the use of ante-mortem solutions.<sup>35</sup> However, these techniques offer only slightly more security than the probate they claim to avoid. There are three commonly used methods of non-probate transfers: revocable inter vivos trusts, joint ownership with survivorship rights, and outright gifts.<sup>36</sup> When non-probate transfers are used, the common factor creating instability is that people are motivated by fears that testamentary instructions will not be carried out. The result is that the post-mortem probate system is compromised.

#### a. *Revocable Inter Vivos Trusts*

Revocable inter vivos trusts have become a popular way of avoiding probate.<sup>37</sup> When a trust of this type is used, the

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35. Fellows, *supra* note 18, at 1067.

36. These three methods, of course, do not provide an exclusive list of the options available.

37. See *Sullivan v. Burkin*, 390 Mass. 864, —, 460 N.E.2d 572, 575 (1984) (revocable trust is not invalid as testamentary disposition); *Westerfeld v. Huckaby*, 474 S.W.2d 189, 193 (Tex. 1971) (trust is not invalid because its purpose is to avoid probate); *Davis v. KB & T Co.*, 309 S.E.2d 45, 49 (W. Va. 1983) (ability to revoke trust does not render trust testamentary); see also *Lundergan, Elderly Clients Require Special Lifetime Planning*, TR. & EST., Feb. 1986, at 33-34 (self-declared trust is popular as probate avoidance device).

settlor transfers property into the corpus of a trust and names those persons as beneficiaries who would have received property under his will.<sup>38</sup> When the settlor dies, the power to revoke the trust is extinguished.<sup>39</sup> The trust continues to operate in favor of the beneficiaries without the intervention of probate.<sup>40</sup> Although this technique is effective, there are both positive and negative attributes which should be weighed in considering it as an alternative to either post-mortem or ante-mortem probate. First, the trust offers protection by placing property within the bounds of equity law where there is less chance of a sympathetic jury upsetting the settlor's intentions.<sup>41</sup> Second, the establishment of a trust reflects greater deliberations on behalf of the would-be testator as to how he wishes his property distributed.<sup>42</sup> Third, a trust generally provides intermediaries, such as a bank or trust officer, that can be used to show the settlor's capacity by their reliance on his demands.<sup>43</sup>

Revocable trusts have a dark side as well. Depending on how they are worded, these trusts can be construed as valid inter vivos conveyances,<sup>44</sup> which may prompt judicial inquir-

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38. The problem of perpetuities usually will not occur. For an excellent composition regarding this issue see T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 208 (1984).

39. See *Citizens Nat'l Bank v. Allen*, 575 S.W.2d 654, 658 (Tex. Civ. App. 1978) (a revocable trust becomes irrevocable on trustor's death). But see *Euart v. Yoakley*, 456 So. 2d 1327, 1329 (Fla. Dist. Ct. App. 1984) (an inter vivos trust may be revoked by written will); *Cisneros v. San Miguel*, 640 S.W.2d 327, 330 (Tex. App. 1982) (a trust conveys defeasible interest to beneficiary which can be defeated by revocation of trust, disposition of trust res by will or nonexistence of res at death).

40. See *Roberts v. Roberts*, 286 F.2d 647, 652 (9th Cir. 1961) (property held under valid inter vivos revocable trust became absolute property of beneficiary on death of settlor); *Favata v. Favata*, 74 Ill. App. 3d 979, 982, 394 N.E.2d 443, 446 (1979) (interest passes on creation of trust to beneficiary, not at death of settlor); *In re Walz*, 423 N.E.2d 729, 733 (Ind. Ct. App. 1981) (the transfer of property through inter vivos trust vests interest at time of creation of trust thereby avoiding effect of probate); *Citizens Nat'l Bank v. Allen*, 575 S.W.2d 654, 658 (Tex. Civ. App. 1978) (a beneficiary may enforce a revocable inter vivos trust on death of settlor).

41. See Langbein, *supra* note 34, at 67 ("[t]rusts belong to the jury-free realm of equity law").

42. See *id.* (an active settlor who conveys property to a corpus and who receives income from a trust shows intentional conduct as compared to testator who merely signs will).

43. *Id.*

44. Being outside the Wills Act, judges are faced with the task of defining the intentions of the testator.

ies to determine, *nunc pro tunc*, the legal intentions of the settlor.<sup>45</sup> Heirs may also challenge the validity of a revocable trust by raising arguments similar to those employed in a will contest, such as claims that fraud or undue influence was exerted on the settlor or that the settlor lacked capacity.<sup>46</sup> Therefore, although a revocable trust might decrease family conflicts and provide greater control by the settlor over his property, it still may not be the most appealing solution.

### b. *Joint Ownership with Survivorship Rights*

Another common probate avoidance technique is joint ownership of property with rights of survivorship.<sup>47</sup> This estate planning tool, commonly used between spouses, permits the property subject to the survivorship agreement to pass immediately to the surviving joint owner without the interference of a probate court.<sup>48</sup> In many situations, this device will effectuate the intent of the parties. However, it is not accurate

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45. See *Payne v. River Forest State Bank & Trust Co.*, 81 Ill. App. 3d 428, —, 401 N.E.2d 1229, 1233 (1980) (the retention of a life estate is relevant on the issue of whether present donative intent exists); *Cruse v. Leary*, 727 S.W.2d 408, 410 (Ky. Ct. App. 1987) (trust not deemed testamentary even though benefits are not distributed until death of settlor).

46. See *Dopp v. Sugarloaf Mining Co.*, 288 Ark. 18, 18, 702 S.W.2d 393, 393 (1986) (trust overturned based on fraud or forgery); *Olson v. Harshman*, 233 Kan. 1055, —, 668 P.2d 147, 149 (1983) (daughter sued to set aside trusts that were executed by her parents on the grounds of undue influence by a brother); *Coleman v. First Nat'l Bank*, 81 Nev. 51, —, 506 P.2d 86, 87 (1973) (daughter challenged trust on the basis of incompetency at the time of execution); see also *Nickerson v. Fiduciary Trust Co.*, 6 Mass. App. Ct. 317, —, 375 N.E.2d 357, 358 (1978) (settlor sues to reform or invalidate trust on grounds of undue influence); *Brinker v. Wobaco Trust Ltd.*, 610 S.W.2d 160, 163 (Tex. Civ. App. 1980) (equity allows reformation of trust where, by mistake, it fails to express the true intent of settlor); see generally *Fellows*, *supra* note 18, at 1094.

47. See, e.g., FLA. STAT. ANN. § 658.56 (West 1984) (deposits and accounts in two or more names); N.Y. BANKING L. § 675 (McKinney 1971 & Supp. 1989) (joint deposits and shares; ownership and payment); OHIO REV. CODE ANN. § 1107.08 (Baldwin 1988) (deposits in name of two or more persons payable on death); TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1990) (right of survivorship in bank accounts).

48. See *Chopin v. Interfirst Bank Dallas N.A.*, 694 S.W.2d 79, 83-84 (Tex. Ct. App. 1985) (nontestamentary transfers are governed by probate code for sums remaining on deposit at death of co-depositor); *Sheffield v. Dozier*, 643 S.W.2d 197, 198 (Tex. Ct. App. 1982) (sums in joint account with right of survivorship are owned by survivor and do not pass to estate); TEX. PROB. CODE ANN. § 451 (Vernon Supp. 1990) (At any time, spouses may agree that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of the other spouse).

to say that joint ownership with survivorship rights is an effective option to ante-mortem probate.

With joint ownership, each owner has the ability to control his or her proportionate share of the asset.<sup>49</sup> Many individuals prefer to retain total control of the property until death and are unwilling to divest themselves of those rights prematurely.<sup>50</sup> Even if the original owner agreed to relinquish his or her rights, the entire transaction, including both its gift and survivorship aspects, could be questioned by dissatisfied heirs or will beneficiaries on various grounds such as lack of capacity and undue influence.<sup>51</sup>

### c. Outright Gifts

The simplest and most pedestrian non-probate transfer is the outright gift.<sup>52</sup> Although gifts are effective in avoiding

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49. See *Gillota v. Gillota*, 4 Ohio St. 3d 222, —, 448 N.E.2d 802, 804 (1983) (a joint account with right of survivorship belongs to all parties during their lifetimes in proportion to net contributions on deposit unless clear and convincing evidence exists of a different intent); *In re Estate of Thompson*, 66 Ohio St. 2d 433, —, 423 N.E.2d 90, 94 (1981) (a joint account belongs to each depositor for so much as contributed during their lifetimes unless clear and convincing evidence exists of a different intent); *Isbell v. Williams*, 705 S.W.2d 252, 254 (Tex. Ct. App. 1986) (probate code established a rebuttable presumption of ownership in favor of depositor during his lifetime unless contrary intent is shown); see also FLA. STAT. ANN. § 658.55 (West 1984) (bank deposits made in the names of two or more persons are payable to either during their lifetimes); N.Y. BANKING L. § 675 (McKinney 1971 & Supp. 1989) (all deposits in any form in a joint account are the property of all depositors as joint tenants and are payable to either or both during their lifetimes); TEX. PROB. CODE ANN. § 438 (Vernon 1980) (a joint account belongs to parties according to the net contributions of each during their lifetimes).

50. See M. RHEINSTEIN & M. GLENDON, *THE LAW OF DECEDENTS' ESTATES* 612 (1971) (discussing the reluctance of many people to divest themselves of property prior to death).

51. See, e.g., *Briscoe v. Florida Nat'l Bank*, 394 So. 2d 492, 493 (Fla. Dist. Ct. App. 1981) (evidence of a confidential relationship between defendant and a 98 year old decedent accompanied by defendant's procurement of a joint account created prima facie case of undue influence); *In re Estate of Webb*, 18 Ohio App. 2d 287, —, 249 N.E.2d 83, 93 (1969) (when creator of a joint account becomes incompetent, the co-owner no longer has authority to withdraw funds during his lifetime prior to creator's death over his rightful share); *In re Estate of Moore*, 26 Ohio Op. 37, —, 188 N.E.2d 221, 224 (1962) (an incompetent depositor could not make a valid contract in a joint tenancy account with a right of survivorship; thus, monies did not pass to survivor on his death).

52. See *Cogdill v. First Nat'l Bank*, 193 S.W.2d 701, 702 (Tex. Civ. App. 1946) (inter vivos gifts require delivery of subject matter by the donor to the donee and intent by the donor to vest in the donee unconditional and immediate ownership of property

probate, they are a poor substitute for ante-mortem probate. While outright gifts are irrevocable,<sup>53</sup> wills which have been admitted to ante-mortem probate remain ambulatory.<sup>54</sup> Only individuals who are extremely wealthy or who are primarily concerned with decreasing the size of their estate for tax reduction purposes are willing to divest themselves of their ownership rights in significant amounts of property prior to death; people dislike placing themselves at the charity or mercy of others.<sup>55</sup> As with the other two commonly used probate avoidance techniques, outright gifts may also be contested on various grounds such as lack of capacity and undue influence.<sup>56</sup>

## 2. Self-Proved Wills

Pursuant to the Uniform Probate Code,<sup>57</sup> as well as the probate statutes of many states,<sup>58</sup> a person may create a self-proved will by executing a separate instrument, usually an affidavit, along with the will. The accompanying instrument, which is signed by the testator as well as the requisite number of witnesses, is then notarized.<sup>59</sup> Although the self-proved

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delivered); CAL. CIV. CODE § 1146-1148 (Deering 1988) (a gift is a voluntary, irrevocable transfer of personal property without consideration which requires actual or constructive delivery to donee).

53. See, e.g., CAL. CIV. CODE § 1148 (Deering 1988) (any gift other than that made in contemplation of death cannot be revoked by giver); OHIO REV. CODE ANN. § 1339.33 (Baldwin 1988) (a gift or transfer made pursuant to certain statutory conditions is irrevocable).

54. See ARK. CODE ANN. § 28-40-203 (1987) ("validated wills may be modified or superseded"); N.D. CENT. CODE § 30.1-08.1-03 (Supp. 1989) (will is binding but may be altered in a subsequent ante-mortem proceeding); OHIO REV. CODE ANN. § 2107.084(D) (Anderson Supp. 1988) (modification and revocation permitted).

55. See M. RHEINSTEIN & M. GLENDON, *supra* note 50, at 612 ("it is not to many people's taste to divest themselves . . . of all property during their lifetimes and thus to throw themselves upon other people's trust or charity").

56. See, e.g., Estate of Truckenmiller, 97 Cal. App. 3d 326, 334, 158 Cal. Rptr. 699, 704 (1979) (a gift may be set aside on the basis of undue influence by some act or conduct of donee but not on belief of donor alone); Randolph v. Randolph, 28 Misc. 2d 66, —, 212 N.Y.S.2d 468, 471 (N.Y. Sup. Ct. 1961) (a gift induced by fraud may be rescinded); Pace v. McEwen, 574 S.W.2d 792, 794 (Tex. Civ. App. 1978) (an aged and frail donor who acted without independent advise and who gave fiduciary stock leaving him in impoverished condition was sufficient to suggest no intent to make gift).

57. UNIF. PROB. CODE § 2-504 (1982).

58. See, e.g., ALA. CODE § 43-8-132 (Supp. 1985); MO. ANN. STAT. § 474.337 (Vernon 1989); TEX. PROB. CODE ANN. § 59 (Vernon 1980).

59. See *supra* notes 11-13.

will provides a presumption that the mechanical elements of the will have been satisfied, a contestant to the will may still prove fraud, forgery, and undue influence.<sup>60</sup> While self-proving wills dispense with the need for witnesses at informal probate hearings, the affidavit only bolsters the will's validity establishing a *prima facie* case of proper execution. It does not, however, make a conclusive determination that a will is valid and binding as does ante-mortem probate. Hence, it cannot be a substitute for ante-mortem probate.<sup>61</sup>

### 3. In Terrorem Clauses

The use of in terrorem clauses is another method of discouraging will contests in post-mortem proceedings.<sup>62</sup> This type of clause reduces the potential contestant's financial incentive to challenge the will by giving him a sizeable bequest provided he does not contest the will. Although typically this bequest is substantially less than his intestate share, it is considerably more than what the contestant would receive if the challenge fails.<sup>63</sup> Many jurisdictions will only enforce these forms of "primitive coercion"<sup>64</sup> under certain circumstances.<sup>65</sup>

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60. See UNIF. PROB. CODE § 3-406 comment (1982) (self-proved will does not preclude proof of undue influence, revocation, lack of capacity, or testator's lack of knowledge of the natural objects of his bounty); TEX. PROB. CODE ANN. § 59 (Vernon 1980) ("a self-proved will may be contested . . . in exactly the same fashion as a will not self-proved").

61. See, e.g., Comment, *supra* note 17, at 842-50 (ante-mortem proceedings best protect a testator's intent despite advocacy of alternatives such as videotaped wills, self-proved wills, and in terrorem clauses); Langbein, *supra* note 34, at 70 (conclusive presumption afforded to self-proved wills expressly reserves a contestant's right to prove fraud or forgery).

62. Comment, *supra* note 17, at 845-46, 851.

63. See *id.* at 842-45, 851 (clause typically gives token amount to potential will contestants with condition precedent that there is no contest); see also Jack, *No-Contest or In Terrorem Clauses in Wills—Construction and Enforcement*, 19 SW. L.J. 722, 723 (1965) (no contest clause generally held valid and not against public policy).

64. Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 HASTINGS L.J. 45, 45 (1963).

65. see *Broach v. Hester*, 217 Ga. 59, —, 121 S.E.2d 111, 113 (1961) (in terrorem clause enforceable only where a testator specifies "gift-over"); *Estate of Westfahl*, 674 P.2d 21, 23 (Okla. 1983) (clause is enforceable unless it is violation of public policy or law); *Veltmann v. Damon*, 696 S.W.2d 241, 246 (Tex. App. 1985) (in terrorem clause should be effective where the purpose of the contest is to thwart testator's intentions), *aff'd in part and rev'd in part on other grounds*, 701 S.W.2d 247 (Tex. 1985). But see FLA. STAT. ANN. § 732.517 (West 1976) (penalty for cost unenforceable). See generally Jack, *supra* note 63, at 726.



For example, a forfeiture may not occur if the contest is instituted in good faith and with reasonable cause.<sup>66</sup> However, this conditional use opens the clause to attack by courts with liberal views as to what constitutes a "good faith contest."<sup>67</sup> The technical validity of a will is not established by in *terrorem* clauses. In fact, their use in a will may produce further claims of lack of capacity.<sup>68</sup> Although in *terrorem* clauses may give some peace of mind to the fearful testator, they cannot give the testamentary security established by ante-mortem proceedings.

#### 4. Videotaped Will Execution Ceremonies

The fact that the testator cannot be present to testify at the probate hearing may be the weakest point in post-mortem systems.<sup>69</sup> If the will execution ceremony is preserved on videotape, the testator is effectively brought into the courtroom during a contest. Of course, the testator is not subject to cross examination. The videotape evidence may help to demonstrate the execution of the will, testamentary capacity, testamentary intent, the contents of the will, and lack of undue influence or fraud.<sup>70</sup>

An unaltered videotape is highly accurate, reflecting

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66. See *Colorado Nat'l Bank v. McCabe*, 143 Colo. 21, —, 353 P.2d 385, 392 (1960) (forfeiture provision is not applicable where contest was brought in good faith); *Haynes v. First Nat'l State Bank*, 86 N.J. 163, —, 432 A.2d 890, 904 (1981) (in *terrorem* clause is unenforceable where probable cause exists); *Estate of Seymour*, 93 N.M. 328, —, 600 P.2d 274, 278 (1979) (bequest is not forfeited where contest is in good faith and with probable cause based on totality of circumstances); see generally Leavitt, *supra* note 64, at 67 n.87 (in *terrorem* clause penalty is ineffective for beneficiary who contests a will in good faith with probable cause to contest).

67. See *Estate of Westfahl*, 674 P.2d 21, 25 (Okla. 1983) (good faith offer of subsequent will does not invoke forfeiture even though subsequent will was not genuine); *Wadsworth v. Brigham*, — Or. —, —, 259 P. 299, 303-04 (1927) (good faith found and forfeiture not applicable where child filed contest who was not named in will); *Estate of Kubick*, 9 Wash. App. 413, —, 513 P.2d 76, 80 (1973) (contestant deemed to have acted "in good faith and for probable cause" where a suit brought on the advice of a fully informed attorney); see also Comment, *supra* note 17, at 845 (the value of an in *terrorem* clause is limited by what courts may deem as good faith grounds).

68. Comment, *supra* note 17, at 845.

69. See *supra* § II A & B.

70. See, e.g., Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1, 5-7 (1983); Buckley & Buckley, *Videotaping Wills: A New Frontier in Estate Planning*, 11 OHIO N.U.L. REV. 271, 278-80 (1984); Nash, *A Videowill: Safe and Sure*, A.B.A. J. Oct. 1984 at 87, 87-89.

events exactly as they occurred and eliminating the necessity of relying upon witnesses whose memories fade and impressions change as time passes.<sup>71</sup> The tape also preserves valuable, non-verbal evidence such as demeanor, tone of voice, inflections, facial expressions, and gestures. However, this technique is not fool proof. The taping process entails additional costs. In addition, the tape may be altered or destroyed or even used to show the testator lacked the necessary capacity to make a valid will.<sup>72</sup>

Despite the tremendous benefits of a videotaped will execution ceremony under a post-mortem probate system, it pales in comparison to ante-mortem probate. During an ante-mortem probate proceeding, the actual testator is available for direct observation. The testator may be carefully examined, both physically and psychologically, and questioned prior to a ruling on his capacity and freedom from undue influence among other considerations.

### III. EVOLUTION OF ANTE-MORTEM PROBATE

#### A. Biblical

In many respects, ante-mortem probate is not a product of this century or even the previous one. One can find ancient laws and customs recorded in the Bible where a type of living validity of a will was used to facilitate inheritance. Several examples illustrate Biblical accounts of the unquestionable right of inheritance given before the death of the decedent.

Perhaps the most celebrated example can be found in the Book of Ruth in the Old Testament.<sup>73</sup> The customs of the time dictated that Ruth, a young widow, marry the nearest

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71. See McCrystal & Maschari, *supra* note 22, at 249-52 (1980) (potential inaccuracies of human memory create inconsistencies, bias, prejudice, and inaccuracy which slow the administration of justice).

72. *In re Purported Last Will and Testament of Stotlar*, No. 1149 (Del. Ch. 1987) (LEXIS, Del. Library), *aff'd without opinion*, 542 A.2d 358 (Del. 1988) (videotape of a will execution ceremony supported a finding of lack of testamentary capacity); *In re Estate of Seegers*, 733 P.2d 418, 421-22 (Okla. Ct. App. 1986) (videotape of a will execution ceremony supported a finding of undue influence). See generally Beyer, *supra* note 70, at 43-51 (describing potential difficulties with videotaped will execution ceremony); Comment, *supra* note 17, at 842-44 (describing the potential difficulties of using will execution videotape).

73. *Ruth* 1-4.

eligible kinsman;<sup>74</sup> however, the one marked out for Ruth was of a different race and did not wish to marry her.<sup>75</sup> Boaz, a gentle and compassionate, man wished to marry Ruth.<sup>76</sup> Under the law regarding her deceased husband's estate, the first son born to a childless widow would inherit the first husband's property. To facilitate Boaz's marriage to Ruth and resolve the inheritance problems, Boaz went before the elders with the kinsman who had the first right to marry Ruth and to claim the estate. They made a legal contract, evidenced by the passing of a shoe whereby the kinsman gave all rights of the first husband's estate to Boaz.<sup>77</sup>

Another example is found in the book of Genesis. During the time of Isaac, a father passed his inheritance to his eldest son by blessing the son near the end of the father's life.<sup>78</sup> Through an act of trickery and deceit, Jacob, a younger son, wearing a sheepskin to appear hairy like the elder son Essau, received the irrevocable blessing.<sup>79</sup> One might view Jacob as a leader in using a living probate. In addition, when Jacob's eldest son, Rueben, shamed him by engaging in sexual relations with his concubine,<sup>80</sup> Jacob disinherited Rueben despite the laws of primogeniture.<sup>81</sup>

## B. English Common Law

There is evidence in the early development of English ecclesiastical law that a testament could be proved during the testator's lifetime at the testator's request.<sup>82</sup> Upon the testator's petition, the testament would be recorded and registered but would not be delivered under the seal of the Ordinary<sup>83</sup> with a probate and would have no effect until the testator ac-

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74. *Id.* at 3:12-13.

75. *Id.* at 4:6.

76. *Id.* at 3:9-12.

77. *Id.* at 4:7-10.

78. *Genesis* 27:1-4.

79. *Id.* at 27:5-38.

80. *Id.* at 35:1-22.

81. *Id.* at 35:22; 49:3-4.

82. See H. SWINBURNE, A TREATISE OF TESTAMENTS AND LAST WILLS Part 6, § 13, at 65-66 (1635) (photograph reprint 1979).

83. An Ordinary is "[o]ne who had exempt and immediate jurisdiction in causes ecclesiastical." BLACK'S LAW DICTIONARY 989 (5th ed. 1979).

tually died.<sup>84</sup> A will so recorded and registered could still be revoked or altered by the testator.<sup>85</sup> There appears to be little evidence of the effect of a pre-death registration on the disgruntled heirs' ability to contest the testament after the testator's death. As the law evolved, pre-death procedures were abandoned and Ecclesiastical Courts were deemed to have jurisdiction only over the probate of deceased persons' wills.<sup>86</sup>

### C. European Civil law

While the Anglo-American legal system wrestled with problems triggered by post-mortem probate, the civil law systems of Europe developed the "authenticated will" which is executed before a quasi-judicial officer called a notary.<sup>87</sup> Under the European notarial procedure, testators who are fearful of post-mortem contests can execute a will during their lifetime and have in their possession both the executed will as well as evidence of their capacity.<sup>88</sup> Unlike notaries in the United States, European notaries hold a much higher position within the legal system.<sup>89</sup> The European or civil notary is a quasi-judicial officer, usually an attorney, who is experienced at determining the capacity of and influence upon the testator when the will is made.<sup>90</sup> Once the notary authenticates the

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84. See H. SWINBURNE, *supra* note 82, at 65-66.

85. *Id.*

86. See Allen v. Dundas, 3 T.R. 125, 130 (1789).

87. See Langbein, *supra* note 34, at 65. See generally Brown, *The Office of the Notary in France*, 2 INT'L & COMP. L.Q. 60, 66-71 (1953) (distinguishes *notarie* (notary) from French barrister *avoué* (organizes written argument)).

88. See Langbein, *supra* note 34, at 63-71 (1978) (though not the only means of creating a valid will, the use of notaries is expensive and seldom used).

89. See *id.* at 70 (European notaries are fully qualified lawyers and sworn officers of the State); see also Brown, *supra* note 87, at 60, 62 (a notary must comply with specific conditions of admission). French notaries are divided into three classes: "1) those practicing within the ressort or area of jurisdiction of a cour d'appel; 2) those practicing within the ressort of a tribunal de première instance; and 3) those practicing within the ressort of a tribunal de paix." *Id.* at 61. The conditions for admission as a notary are that the applicant 1) is a French citizen, 2) has served his military obligation, 3) is over 25 years of age, 4) has served the necessary apprenticeship duty in a notaries office, 5) has passed the professional examination, and 6) has received favorable commendation from the President of the Chamber of Discipline on the applicant's moral fitness. *Id.* at 62. Additionally the notary must amass considerable wealth to begin his practice or buy an existing practice because every notary must have a separate charge. *Id.* He cannot work in partnership or be employed by another. *Id.*

90. See Langbein, *supra* note 34, at 63-71 (1978) (a continental notary is obliged to

will, it is given great credibility rendering it difficult to set aside in post-mortem proceedings.<sup>91</sup>

When a will is deposited with a notary, strict guidelines govern the revocability of the instrument.<sup>92</sup> This act discourages alteration or revocation of the will which, in turn, increases the instrument's credibility.<sup>93</sup> Therefore, the European authenticated will is generally immune from contest.<sup>94</sup> Although each country has different laws dealing with the authentication of wills,<sup>95</sup> those which employ the civil notarial system offer a valuable lesson in resolving problems in our post-mortem systems.

Of the proposals for ante-mortem probate raised in the United States during the 1930s,<sup>96</sup> many were vaguely based on the civil notarial system of authenticated wills. This method tends to avoid the conflict of adversarial positions while providing the testator and his will with validity and credibility.

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satisfy himself of the testator's compliance with will formalities and the testator's identity when examining submitted authenticated testation).

91. See *id.* (European law attaches an extremely strong presumption of validity to notary's authentication on premise that the notary is an expert in legal paperwork who takes statutory responsibilities seriously). There are four requirements of an *acte authentique* within the French system:

- 1) that a public authority or officer has presided at its making;
- 2) that the *acte* appertains to the attributes of the public authority or officer who has made or received it;
- 3) that the authority or officer has the right to practice in the place where, and at the time when, the *acte* is passed, [and]
- 4) that the *acte* is clothed with all requisite formalities.

Brown, *supra* note 89, at 65. Thus, a notary's *acte* is conclusive evidence until it is impeached for falsity and is executory in itself. *Id.*

92. See Langbein, *supra* note 34, at 69 (a notary keeps the document in his possession to discourage ineffective experiments of altering will and to prevent tampering or forgery after document is notarized).

93. See *id.* (a notarial deposit discourages the ineffective attempts of the testator to alter or revoke the will and to prevent accidental destruction, outright forgery, or unauthorized tampering after the document is authenticated).

94. See *id.* at 65-66, 70 (a notary must satisfy himself of the testator's capacity to make will as a prerequisite to receive or transcribe the document; thus, the will is granted a presumption of validity due to status of notary as expert in legal paperwork).

95. See, e.g., Brown, *supra* note 89, at 60-71 (1953) (specifying the duties of a French notary in certifying a will as distinguished from the barrister, an *avocat* who presents only oral arguments to court for his client and the *avoué*, a public official who may make known to the court his client's complaint in written and authenticated form); 4 MODERN LEGAL SYSTEM CYCLOPEDIA 114 (K. Redden ed. 1984) (the differences and effects of Nonesgasque law (Moroccan) in succession).

96. See *infra* § III(G).

At a minimum, the European experience with ante-mortem probate is evidence that ante-mortem systems do work and that security, not present with the post-mortem process, is available.

#### D. Michigan Statute of 1883

In 1883, the Michigan legislature made a novel attempt to cope with the disruptive and uncertain post-mortem will contest by enacting one of the earliest ante-mortem statutes.<sup>97</sup> The testator was authorized to petition the probate judge of the testator's county of residence asking for the will to be admitted and established as his last will and testament.<sup>98</sup> The petition was required to contain averments that the will was executed by the testator "without fear, fraud, impartiality, or undue influence, and with a full knowledge of its contents."<sup>99</sup> In addition, the testator was required to allege that he was of sound mind and memory and had full testamentary capacity.<sup>100</sup> Accompanying the statements relating to the will's validity, the statute required the testator to supply the names and addresses of the individuals who would be the testator's heirs were he to die intestate and other persons whom the testator desired to be parties to the proceeding.<sup>101</sup>

The judge would then set a hearing date and issue citations to the parties named in the petition as well as direct that notice of the hearing be published.<sup>102</sup> After receiving proof that the citations were served and the notice published, the judge would conduct a hearing resembling a post-mortem probate proceeding.<sup>103</sup> At the hearing, the judge would inquire into all matters alleged in the petition. In addition, he was granted the authority to examine witnesses to ascertain rele-

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97. See 1883 Mich. Pub. Acts 17. The text of the act is set forth in Fink, *supra* note 16, at 268-69 (reproduced in Appendix A).

98. 1883 Mich. Pub. Acts 17, § 1.

99. *Id.* § 2.

100. *Id.*

101. *Id.*

102. *Id.* § 3.

103. *Id.* If any person named in the testator's petition was a minor or under a disability, the judge was required to appoint a guardian ad litem to represent them. *Id.* § 4.

vant facts.<sup>104</sup>

If the judge determined that the testator's allegations were true, he would issue a decree setting forth his findings.<sup>105</sup> A copy of the decree would be attached to the will and certified under seal of the court.<sup>106</sup> This decree would have the same effect as a post-mortem decree and would be conclusive as to the matters stated therein.<sup>107</sup> The judge's decision was appealable in the same manner as a post-mortem probate decree.<sup>108</sup> No restrictions were placed on the ability of the testator to revoke or alter the will nor was re-use of the ante-mortem procedure required.<sup>109</sup>

The usefulness of this innovative statute was short-lived. When Lloyd, a testator, presented his will for probate under the statute, the Michigan Supreme Court heard the case and declared the statute unconstitutional.<sup>110</sup> Two grounds were propounded for the statute's invalidity: (1) It enabled the testator to avoid the rights of a spouse and child; and (2) it failed to provide for finality of judgment.<sup>111</sup> One commentator has argued that the statute failed due to its poor drafting because it only provided for notice by citation to the heirs or other persons named in the petition.<sup>112</sup> The court specifically noted the statute's failure to provide notice and an opportunity to be heard by the testator's wife.<sup>113</sup> An additional weakness of the statute was its policy of determining a will to be valid, yet reserving in the testator the power to amend, revoke, or alter the will. The power of the testator to change the adjudicated will was fatal because it did not provide for finality of a

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104. *Id.* § 4.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* § 5.

109. *Id.* § 6.

110. *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 239, 23 N.W. 28, 29 (1885).

111. *Id.* at 238-39, 23 N.W. at 28-29; *see also* Comment, *supra* note 17, at 826-34 (discussion of *Lloyd* and current proposals to overcome its criticisms).

112. *See* Comment, *supra* note 17, at 827 (although inchoate rights, such as dower and appointment of guardian for minors, are statutorily protected, Michigan statute did not require notice to wife before probate); *see also* Fink, *supra* note 16, at 269 (notice by citation provision was "self serving at best").

113. *Lloyd*, 56 Mich. at 239, 23 N.W. at 29.

judgment.<sup>114</sup>

Judge Campbell, in a concurring opinion, advocated the rejection of ante-mortem probate outright. He stated that "the living can have no heirs" and noted that the will cannot be final until the death of the testator.<sup>115</sup> He felt that to deny this concept of law would undermine the ambulatory nature of a will.<sup>116</sup> Judge Campbell also expressed concern about the possible harm to a family which may flow from the ante-mortem process.<sup>117</sup>

Another commentator has suggested that the criticisms of the statute in *Lloyd* fall into four basic categories and that subsequent ante-mortem statutes have been cautiously drafted to avoid these pitfalls.<sup>118</sup> Other commentators, while acknowledging these criticisms, feel that the primary reason the statute was overruled was the court's belief that the process established was not a judicial one.<sup>119</sup>

At the time *Lloyd* was decided, the court did not perceive any adverse parties to the proceeding because the defendants were the presumptive heirs who had no legal interest in the outcome of the proceeding.<sup>120</sup> This problem arose because the proceeding lacked finality. The testator was free to revoke or change the will after the proceeding leaving his heirs uncertain as to whether they would be recipients at his death. This dilemma led to the criticism that the living could have no heirs.<sup>121</sup> This concept prevented the proceeding from satisfying the constitutional test for jurisdiction which requires that courts hear only controversies between conflicting parties of

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114. See Comment, *supra* note 17, at 827.

115. *Lloyd*, 56 Mich. at 240-41, 23 N.W. at 30; see also Comment, *supra* note 5, at 719 n.19 (unfounded challenges to post-mortem probate are motivated by monetary concerns or less worthy motivations arising out of embarrassment or anger when an heir receives little or nothing).

116. *Lloyd*, 56 Mich. at 241, 23 N.W. at 30-31.

117. *Id.* at 241-42, 23 N.W. at 30 (disappointed heirs would quarrel with testator).

118. Comment, *supra* note 5, at 719 n.19 (categories of criticisms are (1) the finality of judgment; (2) inchoate rights; (3) living have no heirs; and (4) the security of the testator).

119. Edwards, *Antemortem Probate and Judicial Power to Render or Refuse Declaratory Relief*, 7 OHIO N.U.L. REV. 189, 189-91 (1980).

120. *Lloyd*, 56 Mich. at 239, 23 N.W. at 28-29; see also Edwards, *supra* note 119, at 190.

121. *Lloyd*, 56 Mich. at 240, 23 N.W. at 30 (Campbell, J., concurring).



interest.<sup>122</sup> The *Lloyd* court felt that allowing a judicial determination in such a situation would be paramount to issuing an advisory opinion which was prohibited by Michigan's constitution.<sup>123</sup>

In 1937, the United States Supreme Court spoke to clarify the issue of a court's authority to issue a declaratory opinion.<sup>124</sup> By its decision, the Court ratified the Declaratory Judgment Act and gave a new spark of hope for ante-mortem solutions to post-mortem problems.

### E. Use of Declaratory Judgments

When the Michigan Supreme Court held that the 1883 ante-mortem statute was unconstitutional, reliance was placed on the controlling law of the time which set forth the prerequisite of a "case or controversy" before judicial power could be invoked.<sup>125</sup> The court stated that a will could not be declared judicially valid when the testator could later revoke or modify the same instrument. Therefore, a judicial declaration would not create the level of finality required of proper judicial determinations.<sup>126</sup> In 1885, declaratory judgments were considered to be outside the realm of judicial competence. Even as late as 1920, the Michigan Declaratory Judgment Act was held to be unconstitutional for authorizing judicial opinions.<sup>127</sup> The courts were still being strangled in their role as conflict resolvers, having to wait until a situation had erupted

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122. See *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (federal law of justiciability prohibits issuance of advisory opinions); *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 75 (1927) (no justiciable controversy based on uncertain or hypothetical set of facts).

123. *Lloyd*, 56 Mich. at 239, 23 N.W. at 29 (no authority exists for circuit court to decide cases not properly judicial).

124. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 244 (1937) (upholding constitutionality of Declaratory Judgment Act).

125. *Lloyd*, 56 Mich. at 239, 23 N.W. at 29 (petitioner erroneously assumed judgment was final although testator could change will at any time violating case or controversy requirement).

126. *Id.*; see also *Edwards*, *supra* note 119, at 189-91 (no finality of judgment where the testator remains free to modify or revoke judicially valid will).

127. See *Anway v. Grand Rapids Ry. Co.*, 211 Mich. 592, —, 179 N.W. 350, 360-61 (1920) (the court cannot answer abstract questions of law under the Declaratory Judgment Act because it does not confer judicial power to answer such questions; required performance of nonjudicial acts prohibited by Michigan Constitution). After the Michigan Legislature redrafted the Declaratory Judgment Act in 1929, the Act was found to be constitutional. See *Washington-Detroit Theater Co. v. Moore*, 249 Mich.

into a full-blown controversy before offering peaceable solutions.

In 1937, the United States Supreme Court broke the shackles restraining judicial involvement by clarifying what constitutes a "controversy." In *Aetna Life Insurance Co. v. Haworth*,<sup>128</sup> the Court held that the Federal Declaratory Judgment Act (FDJA) did not create new substantive rights; rather, the FDJA was a procedural tool for dealing with controversies in the constitutional sense.<sup>129</sup> On this latter point, the Court said:

A controversy in this sense must be one that is appropriate for judicial determination . . . A justiciable controversy is thus distinguished from one that is academic or moot . . . The controversy must be definite and concrete touching the legal relations of parties having adverse legal interests . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.<sup>130</sup>

This development opened the door to the use of declaratory judgments when a court made a determination regarding the validity of a will and legal rights stemming from it. Yet, three other issues still needed clarification after declaratory judgments were approved before drafters could solve the ante-mortem puzzle with a declaratory solution: 1) the requirements of "ripeness, sufficiency and adversity of the parties;"<sup>131</sup> 2) an actual concrete controversy; and 3) finality of the judgment.<sup>132</sup>

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673, —, 229 N.W. 618, 621 (1930) (redrafting eliminated prior constitutional infirmities).

128. 300 U.S. 229, 240-41 (1937) (a controversy must be definite and concrete, touching legal rights of parties with adverse legal interests).

129. *Id.* at 240; Edwards, *supra* note 119, at 191.

130. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 229, 240-41 (1937) (citations omitted).

131. For example, can a person have the validity of his will examined if there is no one of record opposing his doing so? If the answer is no, then the testator would be refused such determination and, provided the would-be heir keeps quiet until the testator's death, an heir could then use the testator's repetitive attempts to validate his will by ante-mortem procedures to indicate his lack of capacity.

132. Edwards, *supra* note 119, at 192 (Ohio Declaratory Judgment Act imposes similar limitations parallel to federal constitutional requirements).

Several states have attempted to overcome these procedural hurdles by enacting specific ante-mortem legislation.<sup>133</sup> Other jurisdictions, despite adoption of statutes authorizing declaratory judgments,<sup>134</sup> do not grant jurisdiction to any specific court to determine the validity of a living testator's will.<sup>135</sup> For example, in the Texas case of *Cowan v. Cowan*,<sup>136</sup>

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133. See *infra* § V(A), (B), & (C) discussing the statutes of North Dakota, Ohio, and Arkansas.

134. See UNIF. DECLARATORY JUDGMENTS ACT §§ 1-17 (1975). The Uniform Declaratory Judgments Act has been adopted in 40 states. See ALA. CODE §§ 6-6-220 to -232 (1977); ARIZ. REV. STAT. ANN. §§ 12-1831 to -1846 (West 1982); ARK. CODE ANN. §§ 16-1111-101 to -111 (1987); COLO. REV. STAT. §§ 13-51-101 to -115 (1987); DEL. CODE ANN. tit. 10, §§ 6501-6503 (Supp. 1988); FLA. STAT. ANN. §§ 86.011-.111 (West 1987); GA. CODE ANN. §§ 9-4-1 to -10 (1982); IDAHO CODE §§ 10-1201 to -1217 (1979); ILL. ANN. STAT. ch. 110, para. 2-701 (Smith-Hurd 1983); IND. CODE ANN. §§ 34-4-10-1 to -16 (Burns 1986); LA. CODE CIV. PROC. ANN. arts. 1871-1883 (West 1961); ME. REV. STAT. ANN. tit. 14, §§ 5951-5963 (1980); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-401 to -415 (1984); MASS. ANN. LAWS ch. 231A, §§ 1-9 (Law. Co-op. 1986); MINN. STAT. ANN. §§ 555.01-.16 (West 1988); MO. ANN. STAT. §§ 527.010-.140 (Vernon 1953 & Supp. 1988); MONT. CODE ANN. 27-8-101 to -313 (1987); NEB. REV. STAT. §§ 25-21,149 to ,164 (1985); NEV. REV. STAT. §§ 30.010-.160 (1987); N.J. STAT. ANN. §§ 2A:16-50 to -62 (West 1978); N.M. STAT. ANN. §§ 44-6-1 to -15 (1978); N.C. GEN. STAT. §§ 1-253 to -267 (1988); N.D. CENT. CODE §§ 32-23-01 to -13 (1976); OHIO REV. CODE ANN. §§ 2721.01-.15 (Baldwin 1984); OKLA. STAT. ANN. tit. 12, §§ 1651-1657 (West 1980); OR. REV. STAT. §§ 28.010-.160 (1983); 42 PA. CONS. STAT. ANN. §§ 7531-7541 (Purdon 1982); R.I. GEN. LAWS §§ 9-30-1 to -16 (1985); S.C. CODE ANN. §§ 15-53-10 to -140 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. §§ 21-24-1 to -16 (1987); TENN. CODE ANN. §§ 29-14-101 to -113 (1980); TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001-.011 (Vernon 1986); UTAH CODE ANN. §§ 78-33-1 to -13 (1987); VT. STAT. ANN. tit. 12, §§ 4711-4725 (1973); VA. CODE ANN. §§ 8.01-184 to -191 (1984); WASH. REV. CODE ANN. §§ 7.24.010-.144 (1961); W. VA. CODE §§ 55-13-1 to -16 (1981); WIS. STAT. ANN. §§ 806.04 (West 1977 & Supp. 1988); WYO. STAT. §§ 1-37-101 to -115 (1988); see also IOWA R. CIV. P. 261-269. Two United States territories have also adopted this uniform act. See P.R. LAWS ANN. tit. 32, App. III, Rule 59 (1984); V.I. CODE ANN. tit. 5, §§ 1261-1272 (1967).

135. But see *Richardson v. First Nat'l Life Ins. Co.*, 419 S.W.2d 836, 837-38 (Tex. 1967) (residual jurisdiction exists solely in Texas district courts only where remedy or jurisdiction is not provided for by law or by constitution); *Shelvin v. Lykos*, 741 S.W.2d 178, 186 (Tex. Ct. App. 1987) (Evans, C.J., dissenting) (the trial court did not have constitutional jurisdiction to order taking and testing of blood because jurisdiction had not been granted by the Texas Constitution, law, or other authority). The concept of residual jurisdiction vests a particular court of the state with general exclusive jurisdiction over causes of action for which jurisdiction is not given to any other court by constitutional decree or statutory delegation. See *Super X Drugs v. State*, 505 S.W.2d 333, 336 (Tex. Civ. App. 1974). Once jurisdiction attaches, the district court is empowered to hear and determine the controversy and carry to execution the judgment of the court. *Cleveland v. Ward*, 116 Tex. 1, 9, 285 S.W. 1063, 1069 (1926). The basis for residual jurisdiction in Texas exists in both the Constitution and statute. See TEX. CONST. art. V, § 8 (1891, amended 1985); TEX. GOV'T CODE ANN. § 24.008 (Vernon

two children asked that their mother's will be declared invalid through a declaratory judgment proceeding. The applicable Texas statute provided that an interested person under a will could have a court determine questions regarding the validity of the instrument.<sup>137</sup> Despite the apparently direct language of the Texas statute, the beneficiary of the will argued that jurisdiction could not be awakened in any Texas court to determine the purported will's validity because the testatrix was still living.<sup>138</sup> In spite of the language expressed in the statute, the appellate court held:

Prior to the enactment of the Uniform Declaratory Judgments Act, no court in Texas had the power to determine the validity of the will of a person still alive, nor in our opinion, does any court in this state now have that jurisdiction [after the enactment of the act].<sup>139</sup>

The Texas court, as justification of its holding, went on to quote the well known maxim that "[u]ntil a man dies it is not known who his heirs will be . . . ."<sup>140</sup> Referring to the *Lloyd* case, the court reiterated that judicial power is confined to controversies between conflicting parties in interest and that the ripeness requirement could never exist between a living man and his possible heirs.<sup>141</sup> Absent a statute expressly conferring such jurisdiction, the court held that there was no judicial authority to hear a suit to establish or annul the will of a living person.<sup>142</sup>

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1988). Although the explicit language of the 1891 Constitution providing for residual jurisdiction was deleted by the 1985 amendment, the proposed change was for simplification purposes only. See 1985 TEX. GEN. LAWS 3357, 3357-58. The Texas Government Code currently provides that "[t]he district court may hear and determine any cause that is cognizable by courts of law or equity and may grant any relief that could be granted by either courts of law or equity." TEX. GOV'T CODE ANN. § 24.008 (Vernon 1988). As long as the elements mandated by a declaratory judgment are met, the district court provides the proper forum for adjudicating the rights of a testator in an ante-mortem proceeding.

136. 254 S.W.2d 862 (Tex. Civ. App. 1952).

137. UNIF. DECLARATORY JUDGMENTS ACT, ch. 164, §§ 1-17 (1943); 1943 TEX. GEN. LAWS 265, 265-66, *repealed by* Act of May 17, 1985, ch. 959, § 9(1), *reprinted in* 1985 TEX. GEN. LAWS 3242, 3322 (now codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.003-.004 (Vernon 1986)).

138. *Cowan*, 254 S.W.2d at 863.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

The court also discussed whether the declaratory judgment statute conferred authority upon Texas courts to determine a person's interests under the will of a living person and stated that the statute did not create any new substantive rights because it viewed the act as "only remedial in nature and procedural in character."<sup>143</sup> Hence, the statute did not give Texas courts jurisdiction over matters not within jurisdictional limits prior to the statute's enactment. Rather, the statute only granted a new method of exercising existing jurisdiction.<sup>144</sup> The court concluded that the matter in *Cowan* was not justiciable; therefore, it should be dismissed.<sup>145</sup>

As a result of *Cowan*, Texas lawmakers, like those in many other states, were faced with overcoming the steadily solidifying principle that no one has an interest in a will before the testator's death.<sup>146</sup> Until a justiciable interest or issue is present, neither the probate nor district court could have jurisdiction.<sup>147</sup> Although declaratory judgments seemed to offer the courts the ability to begin an ante-mortem probate system, courts were not anxious to adopt the use of declaratory judgments in the context of pre-death probate. It seemed that a statute or perhaps a constitutional amendment expressly giving jurisdiction to the courts to hear ante-mortem cases would be required.<sup>148</sup>

## F. Wills of American Indians

In 1910, Congress enacted a kind of ante-mortem probate applicable to certain Indian tribes under the guardianship of the federal government.<sup>149</sup> This procedure permitted an In-

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143. *Id.* at 864.

144. *Id.* (the act is procedural only and offers no new jurisdiction).

145. *Id.* at 865.

146. *See* 57 AM. JUR. *Wills* § 765 (1948) (absence of parties in interest results from maxim that a living person has no heirs or legatees).

147. *See id.* (public policy makes void any attempt to compel testator to "enter upon a contest of his will" with individuals who are devoid of any interest in testator's estate until his death).

148. *See Cowan v. Cowan*, 254 S.W.2d 862, 863 (Tex. Civ. App. 1952) (absent a statute expressly conferring judicial power on a particular court, Texas courts do not possess power to determine living testator's will) (citing 57 AM. JUR. *Wills* § 765 (1948)).

149. Act of June 25, 1910, ch. 431, § 1, 36 Stat. 886 (codified at 25 U.S.C. § 373 (Supp. 1988)).

dian whose will disposed of certain allotments held under trust by the government to have the Secretary of the Interior approve his will prior to death.<sup>150</sup> The Secretary of the Interior was under a duty to "ascertain whether the Indian's signature [was] genuine, to make a full investigation into the mental competency of the testator and of all circumstances which induced its execution, and where natural heirs [were] cut off he must ascertain the reason."<sup>151</sup> The Secretary's approval was final unless fraud was discovered in connection with the execution or procurement of the will within one year after the testator's death.<sup>152</sup> A contemporary commentator heralded this advancement as demonstrating the practicality and value of ante-mortem probate.<sup>153</sup>

The potential for extensive development of this ante-mortem technique, however, was never realized. Although the 1915 regulations governing the Interior Department's approval of wills provided little guidance as to ante-mortem proceedings,<sup>154</sup> the 1923 regulations indicated that the preferred practice was not to approve a will before the testator's death.<sup>155</sup> In the event that an Indian submitted a will during his lifetime, the Office of the Interior was only to examine the form of the will and return it to the Superintendent who would retain the will until the testator's death. At the death of the testator, the will would be resubmitted for consideration.<sup>156</sup> This restriction on any true ante-mortem probate has

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150. *Id.*

151. Lewis, *Ante Mortem Probate of Wills and Testaments*, 50 AM. L. REV. 742, 744 (1916).

152. Act of June 25, 1910, ch. 431, § 1, 36 Stat. 855, 855-56 (codified at 25 U.S.C. § 373 (Supp. 1988)); Lewis, *supra* note 151, at 744.

153. Lewis, *supra* note 151, at 744 ("These Indian wills possibly present the only instance of the *ante-mortem* system but they seem to demonstrate its practicability and its value.").

154. DEPARTMENT OF THE INTERIOR, UNITED STATES INDIAN SERVICE, DETERMINATION OF HEIRS AND APPROVAL OF WILLS, § 3 (1915) [hereinafter DEPARTMENT OF THE INTERIOR], reprinted in W. FRANCISCO, FEDERAL INDIAN PROBATE LAW 150, 151 (1979) (mere mention that Secretary of Interior may approve will before testator's death).

155. DEPARTMENT OF THE INTERIOR, *supra* note 154, at § 37, reprinted in W. FRANCISCO, *supra* note 154, at 170. See generally *id.* at 60 (discussing how 1923 Regulations limited practice of approving wills prior to testator's death).

156. DEPARTMENT OF THE INTERIOR, *supra* note 154, at § 37, reprinted in W. FRANCISCO, *supra* note 154, at 170.

been continued by subsequent regulations.<sup>157</sup>

### G. Renewed Interest in the 1930s

After a period of disenchantment followed by disinterest, ante-mortem probate was revived in the 1930s. The National Conference of Commissioners on Uniform State Laws created a special committee to draft a uniform act to establish wills before the death of the testator.<sup>158</sup> The Committee proposed two methods. The first permitted the testator simply to file the will for safe keeping with the clerk of the court.<sup>159</sup> The second method, described below, was a true ante-mortem probate procedure.<sup>160</sup>

The first tentative draft of the act which delineated the true ante-mortem probate procedure provided that the testator could initiate the ante-mortem process by filing his will in a package under seal with the clerk of the court together with a list of the witnesses to the will.<sup>161</sup> The testator would then supply a petition naming his spouse and prospective heirs as defendants.<sup>162</sup> Assuming the petition was filed in a court with appropriate jurisdiction, the court would issue service of process to the named defendants.<sup>163</sup> If any process was returned unserved, notice by publication would be substituted.<sup>164</sup>

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157. See 43 C.F.R. § 4.260(b) (1988) (current regulation regarding care of an Indian's will). The current provision states in part:

When an Indian executes a will and submits the same to the Superintendent of the Agency, the Superintendent shall forward it to the Office of the Solicitor for examination as to adequacy of form, and for submission by the Office of the Solicitor to the Superintendent of any appropriate comments. The will or codicil or any replacement or copy thereof may be retained by the Superintendent at the request of the testator or testatrix for safekeeping. A will shall be held in absolute confidence, and no person other than the testator shall admit its existence or divulge its contents prior to the death of the testator."

*Id.* (emphasis added).

158. Martin, *Report of Special Committee on Uniform Act to Establish Wills Before Death of Testator*, 9 A.L.I. PROC. 463 (1932).

159. *Id.*

160. *Id.* The Committee's research indicated that no state currently had a true ante-mortem procedure. *Id.* at 464.

161. First Tentative Draft of Uniform Act to Establish Wills before Death of Testator § 2(b), 9 A.L.I. PROC. 465 (1932).

162. *Id.* § 3. The form statute also contained a form for the testator to use. *Id.*

163. *Id.*

164. *Id.* The court would appoint a guardian ad litem for minors and those under a disability. *Id.*

After proper notice was given, a hearing would be conducted to determine whether the will should be admitted to ante-mortem probate.<sup>165</sup> If the will was admitted, the testator would be

conclusively presumed to have executed the writing as and for his will as of the said filing, without fear, fraud, importunity or undue influence, and with a full knowledge of its contents, and that he was of sound mind and memory and full testamentary capacity and that he executed the same in the presence of each of the witnesses who signed the will as a witness, in the presence and at the request of the testator and in the presence of each of the other witnesses and that it was sealed in the presence of all of the witnesses.<sup>166</sup>

Any aggrieved party would have the right to appeal the court's judgment.<sup>167</sup> If the testator wished to revoke the will, he could either file a written withdrawal which automatically revoked the will,<sup>168</sup> or make a written revocation in a subsequent will or codicil.<sup>169</sup> There was no requirement that this action be brought to the court's attention.<sup>170</sup>

However, this tentative draft was not met with a positive response. One commentator believes that the Committee's work was undermined from the beginning because of objections that the proposal would place the Commissioners "in the position of advocating new legislation rather than reforming current legislation."<sup>171</sup>

The concept of ante-mortem probate also received considerable support in the writings of legal commentators in the early 1930s.<sup>172</sup> The most significant was a 1934 article by Duke University Professor David F. Cavers<sup>173</sup> which made

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165. *Id.*

166. *Id.* § 2.

167. *Id.* § 3.

168. *Id.* § 4. A form withdrawal was also supplied for the testator's use.

169. *Id.*

170. *Id.*

171. Fink, *supra* note 16, at 289 (citing HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS AND UNIFORM STATE LAWS AND PROCEEDINGS, at 143 (1931)).

172. See, e.g., Redfearn, *supra* note 8, at 571; Cavers, *supra* note 7, at 440; Kutscher, *Living Probate*, 21 A.B.A. J. 427 (1935).

173. Cavers, *supra* note 7, at 440.



suggestions to avoid problems previously associated with ante-mortem probate.<sup>174</sup> Cavers suggested that a will accompanied by a description of those persons being the next of kin or parties dependent upon the testator could be submitted to a "Probate Officer."<sup>175</sup> The plan also called for the filing of a scriveners affidavit, as well as affidavits from three disinterested witnesses who would comment on the testator's capacity, the circumstances under which the will was drafted, and the existence of potential undue influence.<sup>176</sup> After considering the affidavits and interviewing the declarants and testator, the Probate Officer would then decide to allow or disallow ante-mortem probate.<sup>177</sup> Testators who were refused ante-mortem consideration would be relegated to the traditional post-mortem process. Those for whom ante-mortem probate was allowed would have all of the evidence necessary to effectuate their dispositive plans. The will and appropriate affidavits would be sealed and kept with the court for future use as a shield against unfounded contests in the post-mortem period.<sup>178</sup>

Cavers's approach was typical of other attempts at ante-mortem probate which sprang up during the 1930s in that his approach attempted to correct the infirmities laid out in *Lloyd*. In addition, his approach tried to reduce the common problems with the post-mortem process.<sup>179</sup> Cavers's approach reduced the judicial interest complaint by removing the process from the adversarial arena and placing the evidence gathered in an administrative safe-house for the pending judicial battle.<sup>180</sup> Although the Cavers model did not solve the problem of the revocable will, revocation was made more diffi-

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174. See *id.* at 446-48 (suggesting the appointment of probate officer to determine validity of testator's will).

175. *Id.* at 446.

176. *Id.*

177. See *id.* (if witnesses' opinions were inadequate to show testamentary capacity, a further opportunity should be given to the testator to furnish more qualified witnesses at a later hearing).

178. *Id.* at 447.

179. See, e.g., Cavers, *supra* note 7, at 440; Hulbert, *Probate Psychiatry—A Nero-Psychiatric Examination of Testators from the Psychiatric Viewpoint*, 25 ILL. B.J. 288 (1930); Kutscher, *supra* note 172, at 427; Redfearn, *supra* note 8, at 571.

180. Cavers, *supra* note 7, at 440.

cult.<sup>181</sup> However, Cavers's approach has been criticized recently as denying potential intestate successors and other interested persons the right to challenge the testamentary capacity of the testator.<sup>182</sup>

Several other authors also wrote on ante-mortem probate during the 1930s.<sup>183</sup> For example, one commentator essentially supported the program which Cavers proposed by endorsing the civil law practice of authentication.<sup>184</sup> However, this system exists without the dependency on the collateral attack available in a post-mortem contest.<sup>185</sup>

#### H. Proposals for the Model and Uniform Probate Codes

During the early 1940s, the drafters of the Model Probate Code (MPC) gave brief consideration to the possibility of including provisions for ante-mortem probate.<sup>186</sup> The introduction to the MPC explains in terse language how the drafters carefully considered ante-mortem probate and concluded that "[t]he practical advantages of such a device are not great in

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181. *Id.* at 447-48. Cavers suggests alteration or revocation of the will by reapplication for ante-mortem probate, by preparation of a properly executed will utilized in post-mortem proceeding, or by operation of law on traditional grounds. *Id.* at 447. While opportunity should be given to an individual to attack the proceeding on grounds similar to an action to set aside a judgment, a challenge to the ante-mortem proceeding itself would be difficult. To sustain such a challenge, the plaintiff would need to prove a court has jurisdiction to decide matters regarding non-judicial proceedings, prove fraud or influence of the examiner, show the witnesses made substantial misstatements of fact (not opinion) or that the witnesses were impersonated by individuals without actual knowledge of the testator. *Id.*

182. *See* Fink, *supra* note 16, at 288 (intestate successors "who have the most to lose" would not be contacted as to proceedings and they would be unable to challenge testamentary capacity of testator).

183. *See, e.g.,* Hulbert, *supra* note 179, at 288; Kutscher, *supra* note 172, at 427; Redfearn, *supra* note 8, at 571.

184. Kutscher, *supra* note 172, at 427 (suggesting continued use of authentication used by civil systems).

185. *Id.* at 429. Kutscher noted that use of ante-mortem probate would virtually eliminate post-mortem contests for challenges regarding the veracity of the testator's signature, the testator's capacity to make a will, or fraud in fact. *Id.* Other common post-mortem challenges such as undue influence, fraud in the inducement, or lack of mental competency would greatly decrease if not eliminate these questions due to the presumption of regularity attached to the ante-mortem proceeding. *Id.*; *see also* Fink, *supra* note 16, at 289-90 (use of ante-mortem probate greatly decreases will contests, especially "laughing heir" contests).

186. L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW 20 (1946) (containing text of MODEL PROBATE CODE).

view of the fact that few testators would wish to encounter the publicity involved in such a proceeding."<sup>187</sup>

In the early stages of the development of the Uniform Probate Code (UPC), the drafters again gave serious consideration to inclusion of an ante-mortem procedure.<sup>188</sup> The procedure fared better than the earlier MPC version as evidenced by the summer 1967 draft which contained provisions permitting the testator to petition the court "for an order declaring that his Will has been duly executed and is his valid Will subject only to subsequent revocation."<sup>189</sup> This action would be declaratory in nature and would allow the testator to revoke the submitted will by a simple withdrawal or by a subsequent written will or codicil.<sup>190</sup>

The comments which accompanied the proposed sections reflected the benefits of ante-mortem probate. For example, one comment stated that ante-mortem probate is "often recommended and is of considerable attraction to the public. Its availability offers some insurance against unwarranted Will contests."<sup>191</sup> Despite the initial sanctioning of this progressive estate planning technique, the drafters omitted any reference to ante-mortem probate in subsequent drafts of the UPC.<sup>192</sup> It was not until almost a decade later that a significant resurgence of interest in ante-mortem probate occurred.

#### IV. MODERN THEORIES OF ANTE-MORTEM PROBATE

With the onset of the nation's bicentennial came a resurgence of interest in the field of ante-mortem probate. Between 1976 and 1982, many articles were written expressing both the advantages and disadvantages of the ante-mortem alternative.<sup>193</sup> During this period, writers addressed the four criti-

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187. *Id.*

188. W. ROLLISON, COMMENTARY ON THE UNIFORM PROBATE CODE 25 (1970).

189. Summer, 1967, Draft of the Uniform Probate Code § 2-903, *quoted in*, W. ROLLISON, *supra* note 188.

190. *Id.* § 2-906, *quoted in* W. ROLLISON, *supra* note 188, at 26.

191. *Id.*

192. W. ROLLISON, *supra* note 188, at 26.

193. *See, e.g.*, Fink, *supra* note 16, at 264 (advocating the "contest model" of ante-mortem probate); Langbein, *supra* note 34, at 63 (advocating the "conservatorship model" of ante-mortem probate); Alexander & Pearson, *Alternative Models of Ante-*

cisms of *Lloyd*: (1) inchoate rights; (2) the living have no heirs; (3) the security of the testator; and (4) the lack of enabling legislation.<sup>194</sup> From the above criticisms and difficulties, three basic ante-mortem probate models emerged.

### A. The Contest Model

The first model, proposed by Professor Howard Fink of Ohio State University, is closely related to the Michigan Act of 1883. This proposal places the testator and the prospective heirs in an adversarial situation which allows for a declaratory judgment.<sup>195</sup> Because of its adversarial nature, this proposal has been labeled the contest model.<sup>196</sup> The contest model requires that standing be granted to all individuals who would be heirs by intestate succession as well as to all beneficiaries under the will.<sup>197</sup> In addition, unborn or unascertained heirs are protected by the appointment of a guardian ad litem or by the active protection of others under virtual representation concepts.<sup>198</sup>

After a will is executed under the contest model, the testator would bring suit in a court of competent jurisdiction<sup>199</sup> requesting that the court by declaratory judgment hold the will valid. To determine the will's validity, the court would consider the signatures, the number of witnesses to the will, the absence of undue influence, and the testamentary capacity of the testator.<sup>200</sup> All parties, including named beneficiaries and possible intestate successors would be notified of the proceeding.<sup>201</sup> If the court determined that the will was valid, the

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*Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89 (1979) (advocating the "administrative model" of ante-mortem probate).

194. See Comment, *supra* note 17, at 830-32 (Fink's contest model was developed to respond to the four criticisms of Michigan Supreme Court in *Lloyd*).

195. Fink, *supra* note 16, at 274-75 (proposed statute for ante-mortem probate).

196. The label of "contest model" was given to Fink's proposal and similar adversarial judgment-type suggestions in Langbein, *supra* note 34, at 63.

197. See Fink, *supra* note 16, at 274-77.

198. See *id.* at 274-75 (the interests asserted by the beneficiaries and heirs present would be sufficient to protect those with existing or future interests not present).

199. Assuming that the legislature of the subject state would have designated a court (i.e., probate), and have given it jurisdiction by statute.

200. See Fink, *supra* note 16, at 274 (proposed model to remedy weaknesses of Michigan statute found unconstitutional in *Lloyd*).

201. See *id.* at 274-75 (service would only be to those persons known to be within the state, out of state interest holders would be notified by publication).

will would be filed with the court. It could be nullified by repeating the process.<sup>202</sup> Arkansas, North Dakota, and Ohio have enacted statutes based on the contest model.<sup>203</sup>

While Fink's model offers some solutions to the problems of ante-mortem probate, it is expensive and it leaves many questions unanswered.<sup>204</sup> However, the contest model solves the problem of finality by making the will binding on all parties; it is susceptible to change only by a second judgment.<sup>205</sup> Disclosure of the will's contents and the adversarial nature of the procedure which may cause unrest and disharmony between family and friends of the testator are the proposal's greatest flaws.<sup>206</sup>

### B. The Conservatorship Model

In 1980, Professor John Langbein of the University of Chicago attempted to solve the problems of the contest model with his proposal of the conservatorship model.<sup>207</sup> Like Fink's proposal, Langbein relies on a declaratory judgment to establish finality.<sup>208</sup> This model avoids the harsh sense of human greed and weakness involved in interfamilial litigation by appointing a conservator.<sup>209</sup> The conservator litigates the interests of all the prospective heirs and beneficiaries.<sup>210</sup> Unfortunately, the conservatorship model is plagued with the problems of notice, jurisdictional function, and unrest caused by public disclosure of the contents of the will.<sup>211</sup> Because

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202. *Id.* at 275.

203. *See infra* § V(A), (B) & (C). The proposal's exclusive intrastate notice provision makes questionable the effect of a judgment on an out-of-state interest holder.

204. *See* Comment, *supra* note 17, at 836 (unanswered questions include: security of will's content from public disclosure; subsequent disinheritance for challenging original will; strain on family due to adversarial nature of proceeding).

205. Fink, *supra* note 16, at 275.

206. *See* Comment, *supra* note 17, at 836 (listing contest model's weaknesses).

207. Langbein, *supra* note 34, at 63.

208. *See id.* at 80 (if the court is satisfied that testator has sufficient intent, an ante-mortem judgment is entered conclusive on the points presented).

209. *See id.* (appointment of guardian ad litem permits the development of incapacity in closed setting avoiding an exaggerated adversary contest found in traditional post-mortem litigation).

210. *Id.* at 78.

211. *See id.* at 78-79 (this may create a conflict of interest problem); *see also* Comment, *supra* note 17, at 837 (conservatorship model deficiencies include jurisdiction and public disclosure of will's contents).

both the Fink and Langbein proposals rely on declaratory measures for resolution of the validity issues, the contest of the will under either proposal becomes part of the public record. The repercussions on family life tend to make the proposals poor public policy.<sup>212</sup>

### C. The Administrative Model

Reflecting a significant departure from the contest and conservatorship models, University of Georgia Professors Gregory Alexander and Albert Pearson proposed the implementation of an administrative model of ante-mortem probate. This model envisions a two-step process: (1) the enactment of empowering legislation;<sup>213</sup> and (2) the revision of the statutory conditions on the rights to contest a will.<sup>214</sup> Under this theory, the ante-mortem experience would be neither judicial nor adversarial. The administrative model suggests an ex parte proceeding in which a testator and his circumstances are considered to answer the question of the will's validity rather than a system resembling an accelerated will contest.<sup>215</sup>

The process begins with the testator petitioning the proper court for a determination of the validity of the will.<sup>216</sup> All functions of the court would be in camera and provide the privacy which is lacking with other models because the will would not become a matter of public record.<sup>217</sup> Like the conservatorship model, a guardian ad litem would be appointed under the administrative model. However, this guardian would be an investigating agent of the court rather than a fiduciary of those holding prospective interests in the testator's estate.<sup>218</sup> Like an investigator, this guardian would privately interview the testator to determine the existence of undue influence or lack of capacity.<sup>219</sup> Under this scheme, the guard-

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212. See Comment, *supra* note 17, at 837 (discovery of will's contents by heirs during testator's lifetime creates interfamilial tensions).

213. Alexander & Pearson, *supra* note 193, at 112.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

ian would not normally be informed of the contents of the will. The judge could, however, disclose any provisions of the will which are unusual, for example, those that disinherit close relatives or make large gifts to charity, so the guardian would be able to conduct a thorough investigation.<sup>220</sup>

This administrative proposal eliminates the necessity of giving notice of the proceeding to anyone except the guardian ad litem,<sup>221</sup> on the pretence that prospective heirs have no constitutional right to notice. Their potential interest in the testator's estate, were he to die intestate, is too weak to require notice. However, family members could receive indirect notice of the ante-mortem probate proceedings should they become aware of the guardian ad litem's investigation.

A determination by the court that the declarant is of sound mind and is acting free from undue influence does not determine the rights of persons having a potential interest in the estate. Therefore, the product of the process would be an order declaring the will free from testamentary defects and duly executed.<sup>222</sup> The authors of this proposal assert that because the right to contest the suggested proceeding is statutory and can be changed, the alterations of these statutes should make the administrative proposal functional and legal.<sup>223</sup>

## V. THE ANTE-MORTEM EXPERIENCE

Following rapidly on the heels of the renewed interest in ante-mortem probate exhibited at the end of the past decade, three states enacted ante-mortem statutes based on the contest model: North Dakota in 1977,<sup>224</sup> Ohio in 1978,<sup>225</sup> and Arkansas in 1979.<sup>226</sup> Simultaneously, the National Conference of Commissioners on Uniform State Laws drafted several ver-

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220. *Id.* at 114.

221. *Id.* at 115.

222. *Id.*

223. *Id.* at 117.

224. 1977 N.D. Laws ch. 296, *codified at* N.D. CENT. CODE §§ 30.1-08.1-01 to -04 (Supp. 1987).

225. 1978 Ohio Laws H. 505, *codified at* OHIO REV. CODE ANN. §§ 2107.081-.085 (Anderson Supp. 1987).

226. 1979 Ark. Acts 194, *codified at* ARK. CODE ANN. §§ 28-40-201 to -203 (1987).

sions of a Uniform Ante-Mortem Probate of Wills Act.<sup>227</sup> After this auspicious beginning, enthusiasm for ante-mortem probate began to wane once again. No state has since enacted ante-mortem legislation and the National Conference has abandoned its work on the Uniform Act.<sup>228</sup> This section analyzes these acts and discusses the scant evidence which is available that concerns the use and effectiveness of ante-mortem probate.

### A. North Dakota

#### 1. Analysis of Statute

The North Dakota Ante-Mortem Probate Act is a concise statute providing a simple method for the testator to obtain a declaratory judgment regarding various aspects of his will.<sup>229</sup> The Act authorizes the court to render a judgment declaring that particular requirements for a valid will have been satisfied. The types of matters for which a declaratory judgment may be obtained vary. They range from compliance with formalities, such as the testator's signature and the required number of witnesses and their signatures, to elements of testamentary capacity and freedom from undue influence.<sup>230</sup>

All of the beneficiaries named in the will, as well as those who would be intestate successors if the testator were to die, are necessary parties to the action.<sup>231</sup> To further solidify the standing of the testator's potential testate and intestate takers, the Act declares that these people have inchoate property rights.<sup>232</sup> These parties are served with process under the normal North Dakota Rules of Civil Procedure.<sup>233</sup>

If the court determines that the will was properly executed and that the testator has testamentary capacity and was not unduly influenced, it declares that the will is valid and

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227. UNIF. ANTE-MORTEM PROB. OF WILLS ACT (N.C.C.U.S.L., Proposed Drafts A & B, 1980).

228. Letter from Richard V. Wellman to Gerry W. Beyer (Oct. 7, 1987).

229. N.D. CENT. CODE §§ 30.1-08.1-01 to -04 (Supp. 1987). This statute is reproduced in full in Appendix B.

230. *Id.* § 30.1-08.1-01.

231. *Id.* § 30.1-08.1-02.

232. *Id.*

233. *Id.*



orders that it be filed.<sup>234</sup> This will is then binding on all possible contestants unless and until the testator executes a new will and institutes a new ante-mortem proceeding which names both the appropriate parties to the new action as well as the parties to the former proceeding.<sup>235</sup> Thus, a subsequent will or written revocation is insufficient to negate the ante-mortem probate.

The ante-mortem proceeding is for the limited purpose of determining the will's validity. As a result, facts found in this proceeding are not admissible into evidence in any other action.<sup>236</sup> In addition, the determination in the ante-mortem proceeding is binding on the parties to the action only in litigation brought to determine the validity of a will; in all other cases, the same fact questions may be relitigated.<sup>237</sup>

## 2. Experience

Despite being the oldest modern ante-mortem statute, being in effect for almost a dozen years, the North Dakota Ante-Mortem Probate Act is rarely used.<sup>238</sup> When the Act is followed, the proceedings appear to progress smoothly. There is some evidence that post-mortem contests have been avoided because the testator chose to use the Act.<sup>239</sup> There have been few, if any, contests of ante-mortem probate<sup>240</sup> and no reported cases were located which dealt with ante-mortem probate issues.

### B. Ohio

#### 1. Analysis of Statute

The Ohio statutes that provide for an ante-mortem declaration of the validity of a will are the most detailed of the

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234. *Id.* § 30.1-08.1-03.

235. *Id.*

236. *Id.* § 30.1-08.1-04.

237. *Id.*

238. Letter from John M. Nilles to Gerry W. Beyer (Nov. 7, 1988).

239. Letter from John M. Nilles to Gerry W. Beyer (Jan. 18, 1988) (discussing situation where ante-mortem probate of a will of testatrix who was marginally competent may have prevented post-mortem contest).

240. Letter from John M. Nilles to Gerry W. Beyer (Nov. 7, 1988) (stating that what would have been North Dakota's first contested ante-mortem probate was shifted to a post-death proceeding because of plaintiff's death).

three states having ante-mortem legislation.<sup>241</sup> The substance of the Ohio provisions are basically the same as those of North Dakota; that is, an adoption of the contest model. However, the Ohio statute differs in its extensive procedural rules and in other important aspects. The most significant additions and changes made by Ohio to the North Dakota statute include: (1) Detailed venue rules;<sup>242</sup> (2) extensive service of process rules;<sup>243</sup> (3) comprehensive rules regarding petitions and hearings to revoke or to modify a will which has been admitted to ante-mortem probate;<sup>244</sup> (4) non-use of ante-mortem probate is inadmissible as evidence or as an admission that the testator lacked testamentary capacity or was unduly influenced;<sup>245</sup> (5) the will and a declaration of its validity are filed in a sealed envelope to which only the testator has access during his lifetime—if removed, the declaration of validity no longer has any effect;<sup>246</sup> and (6) the testator may modify or revoke the will using any method allowed under Ohio law; a new ante-mortem proceeding is not required.<sup>247</sup>

## 2. Experience

Compared to those of North Dakota and Arkansas, the Ohio ante-mortem statutes have generated the greatest use, perhaps owing to the larger population of Ohio resulting in the increased interest in ante-mortem probate.<sup>248</sup> In *Cooper v. Woodard*,<sup>249</sup> an Ohio court of appeals was confronted with an attack on the constitutionality of the ante-mortem provisions. The court determined that the pleadings showed that a justici-

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241. OHIO REV. CODE ANN. §§ 2107.081-.085 (Anderson Supp. 1987). This statute is reproduced in full in Appendix C.

242. *See id.* § 2107.081(A) (venue is normally in probate court of county of testator's domicile).

243. *Id.* § 2107.082.

244. *Id.* § 2107.084(C).

245. *Id.* § 2107.081(B).

246. *Id.* § 2107.084(B).

247. *Id.* § 2107.084(D).

248. Population of Ohio as determined by the 1980 census was 10,798,000 as compared to 653,000 for North Dakota and 2,286,000 for Arkansas. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1988 (108th ed. 1987). Several law review articles have focused on the Ohio enactment of ante-mortem probate while few, if any, have focused on the North Dakota or Arkansas statutes. *See, e.g.,* Edwards, *supra* note 119; Comment, *supra* note 5; Comment, *supra* note 17.

249. 1983 WL 6566 (Ohio Ct. App.).

able controversy existed and that "[e]xcept for legislation affecting the right of free speech, assembly, etc., and those rights attendant to keeping open the channels for change of government, legislation is presumed to be constitutional."<sup>250</sup> Because the court found nothing in the record of the case to rebut the presumption of constitutionality, the Ohio ante-mortem statutes were held to pass constitutional muster.<sup>251</sup> In addition, the court affirmed the lower court's refusal to entertain a motion regarding the interpretation of the will by stressing that the sole purpose of the ante-mortem proceeding is to determine the validity of a will.<sup>252</sup>

Another Ohio court confronted the problem of whether the admission of a will to ante-mortem probate was proper under the particular facts of *Fischer v. Greene*.<sup>253</sup> The court held that ante-mortem probate was proper even though the testatrix had been previously determined to be sufficiently mentally incompetent so that a guardian was needed.<sup>254</sup> Because the testatrix was shown to have testamentary capacity by her knowledge that she was executing a will, her knowledge of the objects of her bounty, and her knowledge of the nature of her property, a determination of the validity of the will was proper.<sup>255</sup>

Despite the greater awareness of the ante-mortem probate alternative in Ohio, it nonetheless appears that the statute is infrequently used.<sup>256</sup> In the first eight years of its availability, approximately eight ante-mortem probate cases were filed

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250. *Id.*

251. *Id.*

252. *Id.*

253. No. 82-CA-71 (Ohio Ct. App. April 8, 1983).

254. *Id.*

255. *Id.* Other Ohio courts have cited the ante-mortem provisions but were not called upon to resolve ante-mortem issues. *See* *Coleman v. Rawa*, 1985 WL 4442 (Ohio Ct. App.) (declaratory judgment that decedent concealed property); *Corron v. Corron*, 40 Ohio St. 3d 75, —, 531 N.E.2d 708, 710 (1988) ("whether the probate court has jurisdiction to render a declaratory judgment regarding the validity of a will not admitted to probate and the legal status of certain inter vivos transfers by the testator of property unrelated to the administration of the estate").

256. Letter from Marvin R. Pliskin to Gerry W. Beyer (Nov. 29, 1988) (discussing belief that ante-mortem probate is "very sparingly used"); Letter from Judge Richard B. Metcalf to Gerry W. Beyer (Oct. 6, 1987) (indicating that in his experience as Probate Court Judge of Franklin County, Ohio ante-mortem probate "has very little use").

in Franklin County, one of Ohio's largest counties.<sup>257</sup> It is believed that even fewer cases were filed in other counties.<sup>258</sup> The statute appears to be used most frequently when an attorney has prepared a will for a person who is under guardianship or who is elderly.<sup>259</sup> Few applications are denied because lawyers usually pre-screen clients to determine if they are reasonably competent before attempting to use ante-mortem probate.<sup>260</sup>

### C. Arkansas

#### 1. Analysis of Statute

In 1979, Arkansas became the third and most recent state to enact ante-mortem legislation.<sup>261</sup> Although the Arkansas Ante-Mortem Probate Act is closely modeled after the North Dakota provisions, several important changes were made. First, the Arkansas Act is more broadly phrased to permit declaratory judgments concerning the validity of the will rather than limiting the action to specific aspects of the will's validity.<sup>262</sup> Second, and perhaps of greater significance, the Arkansas Act employs a more liberal approach to modification and revocation. For example, an ante-mortem probated will "may be modified or superseded by subsequently executed valid wills, codicils, and other testamentary instruments, whether or not validated" with ante-mortem proceedings.<sup>263</sup> However, the Arkansas Act does not address whether a revocation by physical act is permitted because the statute only

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257. Letter from Judge Richard B. Metcalf to Gerry W. Beyer (Oct. 6, 1987).

258. *Id.*

259. *Id.*

260. *Id.*

261. ARK. CODE ANN. § 28-40-201 to -203 (1987). This statute is reproduced in full in Appendix D.

262. Compare ARK. CODE ANN. § 28-40-202(a) (1987) (declaratory judgment to establish validity of will) with N.D. CENT. CODE § 30.1-08.1-01 (Supp. 1987) (declaratory judgment permitted regarding the "signature on the will, the required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing the will"). Cf. OHIO REV. CODE ANN. § 2107.084 (Anderson Supp. 1987) (declaratory judgment allowed regarding whether will was executed pursuant to statutory formalities, testator had requisite testamentary capacity, and was free from undue influence).

263. Compare ARK. CODE ANN. § 28-40-203(b) (1987) with N.D. CENT. CODE § 30.1-08.1-03 (Supp. 1987) (ante-mortem probated will remains binding unless new ante-mortem proceeding).

applies to subsequently executed testamentary instruments.<sup>264</sup> Third, the Arkansas Act does not prohibit findings of fact in ante-mortem actions from being used in other proceedings.<sup>265</sup>

## 2. Experience

The Arkansas Ante-Mortem Probate Act seems to be virtually ignored.<sup>266</sup> No reported cases were located which dealt with ante-mortem probate issues. One Arkansas practitioner speculates that although the ante-mortem statute is important, most testators do not wish to disclose the contents of their wills; therefore, they do not elect to use this estate planning technique.<sup>267</sup>

### D. National Conference of Commissioners on Uniform State Laws

Responding to the renewed interest in ante-mortem probate reflected by both state legislatures and legal commentators, the National Conference of Commissioners on Uniform State Laws began the task of investigating the feasibility of ante-mortem probate in 1979.<sup>268</sup> By late 1980, the Uniform Ante-Mortem Probate of Wills Act drafting committee considered two proposals: (1) a declaratory judgment/contest model format developed by the Joint Editorial Board—Uniform Probate Code (Draft A) and; (2) an administrative model based on the writings of Professors Alexander and Pearson<sup>269</sup> drafted by the Ante-Mortem Probate of Wills Act Committee (Draft B).<sup>270</sup>

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264. ARK. CODE ANN. § 28-40-203(b) (1987). The Ohio statute permits revocation of an ante-mortem probated will by any statutorily authorized method. OHIO REV. CODE ANN. § 2107.084(D) (Anderson Supp. 1987).

265. Compare ARK. CODE ANN. § 28-40-203 (1987) (no limitation on use of court findings) with N.D. CENT. CODE § 30.1-08.1-04 (Supp. 1987) (findings of fact not admissible in other proceedings).

266. Letter from Jean D. Stockburger to Gerry W. Beyer (Nov. 8, 1988).

267. *Id.*

268. Letter from Richard V. Wellman to James R. Wade 1-2 (Oct. 12, 1981) (Conference's Scope and Program Committee declined to give its go-ahead recommendation in August 1978; the matter was resubmitted and approved in 1979).

269. UNIF. ANTE-MORTEM PROB. OF WILLS ACT § 1 comment (N.C.C.U.S.L., Proposed Draft B, 1980). See generally *supra* § IV(C).

270. Memorandum from Gregory S. Alexander to Drafting Committee, UNIFORM ANTE-MORTEM PROBATE OF WILLS ACT 1 (Oct. 15, 1980).

### 1. Draft A—A Contest Approach

Draft A reflects the contest approach and was derived from the North Dakota, Ohio, and Arkansas statutes which were already in effect.<sup>271</sup> The most significant difference between these state statutes and Draft A is that under Draft A's procedure any judgment which the testator obtained declaring that his will had been duly executed and is his valid will subject only to revocation, would not be binding on the testator's spouse and decedents.<sup>272</sup> Thus, the utility of ante-mortem probate under Draft A was severely limited because the testator's spouse and children are the most likely individuals to contest a will especially if they are given less than the amount they would receive under intestacy.

To begin the ante-mortem process under Draft A, the testator would file a petition containing a copy of the will along with allegations that the will is a properly signed and witnessed will which was executed with testamentary intent and that the testator had testamentary capacity, free will, and familiarity with its contents.<sup>273</sup>

The defendants to the declaratory judgment action would be "a representative group named from among the heirs presumptive of the [testator] and others who, as devisees under earlier wills of the [testator] or for other reasons, appear to have some prospect of being selected as devisees of the [testator]." <sup>274</sup> If the presumptive heirs are the testator's spouse or descendants, then the defendants would be chosen from those who would be the testator's presumptive heirs if the testator had no spouse or descendants.<sup>275</sup> All of the potential defendants would be named as defendants if their number were small. If the number of potential defendants were large, then several would be sued on behalf of them all.<sup>276</sup> If all potential defendants are not joined, the court must find that those joined would adequately protect all parties with similar

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271. *Id.*

272. UNIF. ANTE-MORTEM PROB. OF WILLS ACT § 1(a) (N.C.C.U.S.L., Draft A, Nov. 1980). The complete text of this draft act is reproduced in Appendix E.

273. *Id.* § 1(b).

274. *Id.* § 1(c).

275. *Id.*

276. *Id.*

interests.<sup>277</sup>

The defendants would receive normal service of process.<sup>278</sup> The court would be authorized to have additional parties served to assure that those with interests adverse to the testator are adequately represented.<sup>279</sup> Interested parties would be allowed to intervene and the will beneficiaries would be made parties if the ante-mortem petition were opposed.<sup>280</sup>

After proper notice, the court would conduct a hearing examining the testator, the attesting witnesses, and other witnesses or relevant evidence.<sup>281</sup> The court would be authorized to make any independent inquiry it deems appropriate<sup>282</sup> including calling "independent witnesses, physicians, psychologists, psychiatrists, and other persons of its own choosing to examine the testator or to testify in the proceedings."<sup>283</sup> If the court sustained the testator's allegations, the will would be declared valid and subject only to subsequent revocation.<sup>284</sup> The original will would remain with the court.<sup>285</sup>

Once the will is accepted by the court, the judgment is binding on the defendants and the persons whose interests they represented. However, the court's judgment would not bind the testator's spouse or descendants who would be free to contest the will after the testator's death.<sup>286</sup> If, on the other hand, the court found for the defendants, the judgment would be a conclusive determination of the will's invalidity.<sup>287</sup>

If the successful testator later decided to revoke this will, he would be permitted to withdraw the will provided that he signed a statement of revocation on the face of the will at the

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277. *Id.*

278. *See id.* § 1(d) (referring to appropriate provision of UNIFORM PROBATE CODE).

279. *Id.*

280. *Id.*

281. *Id.* § 2(a). "Any person who is a competent witness may testify concerning any issue despite possible disqualification after the death of the testator and shall not be precluded by reason of interest." *Id.* § 2(b).

282. *Id.*

283. *See id.* § 2(c) (erroneously listed as sub-section (3) in original).

284. *Id.* § 3(a).

285. *Id.*

286. *Id.* § 3(b).

287. *Id.*

time of its withdrawal from the court.<sup>288</sup> In addition, the testator could revoke or modify the will by a subsequent written will or codicil even though the court is not required to be notified of the testator's actions.<sup>289</sup>

## 2. Draft B—An Administrative Approach

A fundamentally different approach is taken by Draft B which adopts an *ex parte* administrative approach.<sup>290</sup> Draft B appears to be designed either as a comprehensive free-standing act which could be adopted by any state or as a complement to the Uniform Probate Code.<sup>291</sup>

Draft B provides that a testator may "apply to a court in the county of his domicile for a determination that his will has been duly executed and is his valid will subject only to subsequent revocation."<sup>292</sup> Under this draft, ante-mortem probate would have no effect on the ambulatory nature of the will, because the testator would be free to revoke the will in any manner permitted under state law.<sup>293</sup>

Draft B details the contents of the application and provides that the original will must be filed along with the application.<sup>294</sup> However, to protect the testator's privacy the will does not have to be available for public inspection.<sup>295</sup>

Once the application is filed, the court would appoint a special master to assist the court in making determinations regarding due execution of the will.<sup>296</sup> The master would be required to interview the testator as well as members of the

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288. *Id.* § 4.

289. *Id.*

290. Memorandum from Gregory S. Alexander to Drafting Committee, UNIFORM ANTE-MORTEM PROBATE OF WILLS ACT 1 (Oct. 15, 1980).

291. UNIF. ANTE-MORTEM PROB. OF WILLS ACT (N.C.C.U.S.L., Proposed Draft B, 1980). The complete text of this draft act excluding comments is reproduced in Appendix F.

292. *Id.* § 1(a).

293. *Id.* at comment.

294. *Id.* § 1(b) (the application must allege various formalities, testamentary intent, execution by free will, and familiarity with will's contents).

295. *See id.* (only the court or those whom the court determines to be necessary and proper may view the original or any copy of the testator's will).

296. *Id.* § 2(a). The master must be a qualified attorney with no interest in the verification of the will. *Id.* The master's purpose is to assist the court; he "is not a fiduciary representing the interests of undisclosed, would-be contestants." *Id.* at comment.



testator's family, other relatives, friends, and anyone whom the court deemed appropriate.<sup>297</sup> In addition, the court has the discretion to delegate to the master various investigative powers such as the right to the production of relevant documents.<sup>298</sup> The drafters anticipated that a court would examine the gifts made in the will and determine the scope of the master's duties, powers, and responsibilities so that all relevant facts would be ascertained.<sup>299</sup> After the master completed his investigation, he would submit a detailed written report for the court's in camera inspection.<sup>300</sup>

If the court deemed it appropriate, a hearing would then be conducted.<sup>301</sup> The court could interview the testator and other relevant witnesses as well as view physical evidence.<sup>302</sup> In addition, the court would be authorized to call as witnesses "physicians, psychologists, psychiatrists, and other persons of its own choosing to examine the testator or to be interviewed by the Court."<sup>303</sup> The testator would be represented by his attorney or if he had none, by court-appointed counsel.<sup>304</sup> This hearing would be closed.<sup>305</sup> Because the procedure would be ex parte in nature, prior notice would not be given to anyone except the testator and witnesses. Other individuals, such as family members, prospective heirs, and beneficiaries, would not be granted the opportunity to appear.<sup>306</sup> Thus, confidentiality would be assured and the hearing would not become adversarial in nature.<sup>307</sup>

If the court believes that all the formalities for a valid will are satisfied—that the testator has testamentary intent, that he

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297. *Id.* § 2(b). When the master interviews the testator, it must be outside of the presence of the attorney who drafted the will. *Id.*

298. *Id.*

299. *Id.* at comment. Thus, if the testator disinherited his spouse and/or children in favor of distant relatives, friends, or charity, a more thorough investigation could be conducted. *Id.*

300. *Id.*

301. *Id.* § 3. Although this hearing is not required, the drafters believed that a hearing would be routinely held. *Id.* at comment.

302. *Id.* § 3(a).

303. *Id.* § 3(b).

304. *Id.* § 3(a).

305. *Id.* § 3(b).

306. *Id.* at comment.

307. *Id.*

executed the will with his free will, and that he is familiar with its contents—the court will issue a written determination.<sup>308</sup> This determination would state that the will was duly executed and is valid, subject only to the testator's subsequent withdrawal or revocation.<sup>309</sup> The court would then retain custody of the original copy of the will.<sup>310</sup>

A determination of the validity of the will would be "conclusive and binding on all persons."<sup>311</sup> The only way to contest a will admitted to ante-mortem probate under this procedure would be to allege that the will had been subsequently revoked.<sup>312</sup> In addition, no further action would be needed upon the testator's death to probate the will.<sup>313</sup>

The testator would be permitted to withdraw a will from the court that had already determined it to be valid by filing a written notice of withdrawal or revocation.<sup>314</sup> Once the testator files this notice, the will would be of no effect.<sup>315</sup> Additionally, the testator could revoke or modify the will with a subsequent will or codicil even if no notice is given to the court.<sup>316</sup>

Draft B provides that the special master and all other persons employed by either the court or the special master are entitled to reasonable compensation and that the testator is responsible for these expenses.<sup>317</sup>

### 3. Abandonment of Ante-Mortem Project

The Drafting Committee for the Uniform Ante-Mortem Probate of Wills Act met on the seventh and eighth of November, 1980 to discuss these two drafts.<sup>318</sup> The Committee did not adopt either draft, rather, they decided to develop a new draft which would incorporate various policy decisions

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308. *Id.* § 4.

309. *Id.*

310. *Id.*

311. *Id.* § 5.

312. *Id.*

313. *See id.* (however, post-mortem proceedings would be necessary to determine whether the will was subsequently revoked or modified).

314. *Id.* § 6.

315. *Id.*

316. *Id.*

317. *Id.* § 7.

318. Memorandum to JEB-UPC from R.V. Wellman 8 (Nov. 17, 1980).

made at the meeting.<sup>319</sup> For example, the new statute would not contain a description of a special master; instead, each court would use its inherent power to determine whether extraordinary investigations were needed.<sup>320</sup> Additionally, the court would retain a copy of the validated will but would return the original will to the testator. The ante-mortem probate file would be sealed and only be opened upon petition of the testator or someone exhibiting the testator's death certificate.<sup>321</sup> Perhaps the area of greatest debate was the binding effect of the decree. The new draft was to contain three options: (1) binding on everyone except to show fraud on the court or revocation; (2) binding except against testator's spouse and children; or (3) binding unless rebutted by evidence showing that the court was unaware of relevant facts when it validated the will.<sup>322</sup>

Shortly thereafter, the Joint Editorial Board—Uniform Probate Code voted on whether to continue the ante-mortem project. The vote was evenly split.<sup>323</sup> Upon learning of the Board's lack of support, the Drafting Committee voted to cancel the project<sup>324</sup> thus eliminating the hopes of a quick response to the need for uniform ante-mortem legislation.

## VI. RECOMMENDATIONS FOR THE FUTURE OF ANTE-MORTEM PROBATE

The intense interest in ante-mortem probate generated by the burst of commentaries in the late 1970s and reflected in the actions of the legislatures of several states and the National Conference of Commissioners on Uniform State Laws should not be allowed to wither despite the current lack of wide-spread acceptance of the technique. Ante-mortem probate has the potential of greatly improving the ability of our legal system to effectively transmit an individual's wealth by providing the testator with greater certainty that his distribution desires will be fulfilled. Because the validity of the will

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319. *Id.* at 9.

320. *Id.*

321. *Id.*

322. *Id.* at 10.

323. Letter from Richard V. Wellman to James R. Wade (Oct. 12, 1981).

324. *Id.*

would be determined prior to death when all relevant evidence is before the court, will contests would be greatly reduced. In addition, ante-mortem probate would lead to more efficient use of scarce and valuable resources because less court time would be spent dealing with spurious will contests and fewer estate funds would be dissipated defending those contests.

Like any legal tool, ante-mortem probate is not without its difficulties. However, problems encountered with the technique are surmountable or are able to be counterbalanced. Several different models of ante-mortem probate exist which range from a pure adversarial format, the contest model; to an ex parte format, the administrative model. Each model has its positive and negative aspects. There is much debate over which model is preferable. This debate has caused some commentators to conclude that ante-mortem probate is not feasible<sup>325</sup> and has resulted in the National Conference of Commissioners on Uniform State Laws abandoning its ante-mortem project.<sup>326</sup>

The authors hope that this article will spur a rekindling of interest in ante-mortem probate. No attempt is being made to recommend the particular details of the best ante-mortem scheme because the decision to proceed with ante-mortem probate legislation must first be made. Once a commitment is made to develop a workable ante-mortem scheme, attention can be focused on the details of the technique. The benefits of ante-mortem probate should not be withheld from the public merely because the technique is flawed or because it is difficult to ascertain which model will function best.

At this time, there is insufficient experience with the various options to conclude which one is best. What is needed is serious consideration of ante-mortem probate. State legislatures should examine the area carefully and the National Conference of Commissioners on Uniform State Laws should reactivate their ante-mortem drafting committee. Bar associations and attorneys in states which have already enacted ante-mortem legislation should publicize the technique and its advantages so that more testators avail themselves of the proce-

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325. See Fellows, *supra* note 18, at 1114 (the purpose of the article is to "discourage the adoption of living probate schemes").

326. See *supra* notes 318-324.

ture. As more testators use the technique and as more statutes are enacted, evidence, rather than speculation, will be available to evaluate the ante-mortem probate models and lead to an informed decision as to the most effective model. It may even be possible that several models could co-exist in the same state giving the testator the option as to method and effect.

The testator's desire to insure that the distribution of his estate is not frustrated by a will contest differs with each individual. Some testators may have no interest in any type of ante-mortem procedure because his will treats potential heirs in a manner similar to the state's intestate distribution statutes. Others might be satisfied with a simple procedural change that eases the proponent's burden of proof of a valid will. A third group of testators, realizing that their will stands a high probability of being contested, may wish, and be willing to pay for, an absolutely fool-proof means of precluding a contest. The third situation provides the most obvious scenario for using ante-mortem probate.

The present general status of probate law requires an applicant who seeks to probate a will to prove all statutory requirements that concern the competency and capacity of the testator<sup>327</sup> as well as the requisite formalities of the will.<sup>328</sup> For most testators, this may not be an undesirable require-

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327. See, e.g., *Estate of Sanderson v. Martin*, 341 P.2d 358, 363 (Cal. Ct. App. 1959) (presumption exists that a person is sane at the execution of a will with the burden on the contestant to show incapacity); *In re Young*, 60 Ohio App. 2d 390, —, 397 N.E.2d 1223, 1225-26 (1978) (will must be admitted when the proponents introduce substantial evidence tending to prove the validity of the will); *Nowlin v. Trotman*, 348 S.W.2d 169, 172 (Tex. Civ. App. 1961) (the proponent has burden of proof in making out a prima facie case of testamentary capacity); see also CAL. PROB. CODE § 8252 (Deering Supp. 1989) (proponents have burden of proof of due execution when will contested); OHIO REV. CODE ANN. § 2107.18 (Baldwin 1988) (a court shall admit to probate a will if it appears from the face of the will or demanded by attesting witnesses that its execution complies with the law valid at that time).

328. See CAL. PROB. CODE § 6110 (Deering Supp. 1989) (a valid executed will requires a writing signed by testator or by his direction in the presence of two attesting witnesses who understand that instrument they sign is testator's will); OHIO REV. CODE ANN. § 2107.03 (Baldwin 1988) (a valid executed will requires a writing signed at the end of the document by a party making it or by his designated person in testator's presence and be attested and subscribed in his presence by two or more competent witnesses who saw testator subscribe or heard him acknowledge his signature); TEX. PROB. CODE ANN. § 59 (Vernon 1980) (every last will shall be in writing signed by testator or person designated by him in his presence attested to, if not wholly in testator's hand-

ment. However, cases illustrate that in many instances this burden can be a pit-fall.<sup>329</sup> A change in this burden of proof may result in a procedure which is more fair in many instances. For example, if the will is self-proved by statutory affidavit as is allowed in many states,<sup>330</sup> or if the will execution ceremony is videotaped,<sup>331</sup> then a statutory presumption that the will is valid and proper for probate could be created. A contest would continue to be permitted, but the burden of proof would shift to the contestant to prove the invalidity of the will.

Finally, if the testator desires and is willing to absorb the cost of the procedure, an ante-mortem technique should be available to assure the effectiveness of a testator's resolution that a will contest will not occur. Although it may be premature to make a knowledgeable recommendation as to whether an adversarial, guardianship, or administrative model of ante-mortem probate should be adopted, law makers should undauntingly pursue this viable alternative to post-mortem probate.

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writing, by two or more credible witnesses over fourteen years of age who shall subscribe their names thereto in their own handwriting in the presence of testator).

329. See, e.g., *Estate of Morgan v. Peterson*, 225 Cal. App. 2d 156, —, 37 Cal. Rptr. 160, 168-69 (1964) (testamentary incompetency on a given day can be proven by incompetency at times prior to and after that date particularly when characteristics of testator's malady indicate permanent and progressing mental disease); *Estate of Bliss v. Williams*, 199 Cal. App. 2d 630, —, 18 Cal. Rptr. 821, 827 (1962) (finding that testator was of unsound mind when the will was executed was sustained by evidence that the testator was not aware of his properties and mentally incapable of transacting any business); *Borgman v. Dillow*, 61 Ohio L. Abs. 429, —, 105 N.E.2d 69, 70 (Ohio Ct. App. 1951) (will not admitted to probate where proponent failed to prove that witness saw testatrix's signature and where testatrix failed to tell witness that she had signed it); *In re Stock's Will*, 174 Okla. 78, —, 49 P.2d 503, 505 (1935) (proponents failed to prove due execution and attestation of a will by a preponderance of evidence); *Hogan v. Stoepler*, 82 S.W.2d 1000, 1002 (Tex. Civ. App. 1935) (will failed where alleged testator did not execute the will according to statutory prerequisites and alleged subscribing witnesses did not witness it).

330. See, e.g., MO. ANN. STAT. § 474.337 (Vernon Supp. 1989) (self-proving will provision); OKLA. STAT. ANN. tit. 84, § 55 (West Supp. 1989) (self-proving will clause); 20 PA. CONS. STAT. ANN. § 3132.1 (Purdon Supp. 1988) (provision for self-proving will); TEX. PROB. CODE ANN. § 59 (Vernon 1980) (self-proving will provision).

331. See *supra* § II(B)(4) and accompanying notes.

## APPENDIX A

Michigan Act  
1883 Mich. Pub. St. 17

Sect. 1. The people of the state of Michigan enact, that to any will heretofore or hereafter executed, the testator may make and annex his petition to be sworn to before and presented to the judge of probate for the county where the testator resides, asking that such will be admitted and established as his last will and testament.

Sect. 2. Every such petition shall contain averments that such will was duly executed by the petitioner without fear, fraud, impartiality, or undue influence, and with a full knowledge of its contents, and that the testator is of sound mind and memory and full testamentary capacity and shall state the names and addresses of every person who at the time of making and filing the same would be interested in the estate of the maker of such will as heir if such maker should at the making of such petition become deceased, and may also contain the names and addresses of any other persons whom such testator may desire to make parties to such proceedings.

Sect. 3. Such judge of probate shall thereupon, upon request of such testator, appoint a time for the hearing of such petition and issue citations to the parties named in such petition, and direct published notice of such hearing, and have such hearing, after proof of service of citations and of publication of notice, in the manner, as near as practicable, as is required for the probate of wills.

Sect. 4. If any person named in such petition shall be a minor, or otherwise under disability, a guardian *ad litem* shall be appointed by such judge to represent such person. On such hearing such judge of probate shall examine into the matters alleged in such petition, and into the testamentary capacity of such testator, and examine witnesses in relation thereto, and if it shall appear that the allegations of such petition are true, and that said testator was of sound mind and memory and full testamentary capacity, such judge shall make a decree thereon, and shall cause a copy of such decree to be attached to said will, certified under the seal of said court, decreeing that the testator, at the making of such will and such petition,

was possessed of sound mind and memory, and full testamentary capacity, and that said will was executed without fear, fraud, impartiality or undue influence, which decree shall have the same effect as if made by said court after the death of the testator on the probate of such will, and such will having been so established shall not be set aside or impeached on the grounds of insanity or want of testamentary capacity on the part of the testator, or that the same was executed through fear, fraud, impartiality, or undue influence.

Sect. 5. Appeals shall be in the same manner as from probate of wills.

Sect. 6. Nothing in this act contained shall be construed to prevent the revocation of such will, or alteration or other change thereof, as in ordinary wills.



## APPENDIX B

North Dakota  
N.D. Cent. Code (Supp. 1987)  
Chapter 30.1-08.1  
Ante-Mortem Probate of Wills

30.1-08.1-01. Declaratory judgment. Any person who executes a will disposing of his estate in accordance with this title may institute a proceeding under chapter 32-23 for a judgment declaring the validity of the will as to the signature on the will, the required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing the will.

30.1-08.1-02. Parties—Process. Any beneficiary named in the will and all the testator's present intestate successors shall be named parties to the proceeding. For the purposes of this chapter, any beneficiary named in the will and all the testator's present intestate successors shall be deemed possessed of inchoate property rights.

Service of process upon the parties to the proceeding shall be made in accordance with rule 4 of the North Dakota Rules of Civil Procedure.

30.1-08.1-03. Finding of validity—Revocation. If the court finds under chapter 32-23 that the will has been properly executed and that the plaintiff testator has the requisite testamentary capacity and freedom from undue influence, it shall declare the will valid and order it placed on file with the court. For the purposes of section 30.1-12-02, a finding of validity under this chapter shall constitute an adjudication of probate. The will shall be binding in North Dakota unless and until the plaintiff-testator executes a new will and institutes a new proceeding under this chapter naming the appropriate parties to the new proceeding as well as the parties to any former proceeding brought under this chapter.

30.1-08.1-04. Admissibility of facts—Effect on other actions. The facts found in a proceeding brought under this chapter shall not be admissible in evidence in any proceeding other than one brought in North Dakota to determine the validity of a will; nor shall the determination in a proceeding under this chapter be binding, upon the parties to such pro-

ceeding, in any action not brought to determine the validity of a will.

## APPENDIX C

## Ohio

Ohio Rev. Code Ann. (Anderson Supp. 1987)  
Declaration of Validity of Will

[§ 2107.08.1] § 2107.081 Petition for judgment declaring validity of will.

(A) A person who executes a will allegedly in conformity with the laws of this state may petition the probate court of the county in which he is domiciled, if he is domiciled in this state or the probate court of the county in which any of his real property is located, if he is not domiciled in this state, for a judgment declaring the validity of the will.

The petition may be filed in the form determined by the probate court of the county in which it is filed.

The petition shall name as parties defendant all persons named in the will as beneficiaries, and all of the persons who would be entitled to inherit from the testator under Chapter 2105. of the Revised Code had the testator died intestate on the date the petition was filed.

For the purposes of this section, "domicile" shall be determined at the time of filing the petition with the probate court.

(B) The failure of a testator to file a petition for a judgment declaring the validity of a will he has executed shall not be construed as evidence or an admission that the will was not properly executed pursuant to section 2107.03 of the Revised Code or any prior law of this state in effect at the time of execution or as evidence or an admission that the testator did not have the requisite testamentary capacity and freedom from undue influence under section 2107.02 of the Revised Code.

[§ 2107.082] § 2107.082 Service of process.

Service of process in an action authorized by section 2107.081 [2107.08.1] of the Revised Code shall be made on every party defendant named in that action by the following methods:

(A) By certified mail, or any other valid personal service permitted by the Rules of Civil Procedure, if the party is an inhabitant of this state or is found within this state;

(B) By certified mail, with a copy of the summons and petition, to the party at his last known address or any other valid personal service permitted by the Rules of Civil Procedure, if the party is not an inhabitant of this state or is not found within this state;

(C) By publication, according to Civil Rule 4.4, in a newspaper of general circulation published in the county where the petition was filed, for three consecutive weeks, if the address of the party is unknown, if all methods of personal service permitted under division (B) of this section were attempted without success, or if the interest of the party under the will or in the estate of the testator should the will be declared invalid is unascertainable at that time.

[§ 2107.08.3] § 2107.083 Hearing on validity of will.

When a petition is filed pursuant to section 2107.081 [2107.08.1] of the Revised Code, the probate court shall conduct a hearing on the validity of the will. The hearing shall be adversary in nature and shall be conducted pursuant to section 2721.10 of the Revised Code, except as otherwise provided in sections 2107.081 [2107.08.1] to 2107.085 [2107.08.5] of the Revised Code.

[§ 2107.08.4] § 2107.084 Declaration of validity; sealing, filing; procedure for revoking or modifying will.

(A) The probate court shall declare the will valid if, after conducting a proper hearing pursuant to section 2107.083 [2107.08.3] of the Revised Code, it finds that the will was properly executed pursuant to section 2107.03 of the Revised Code or under any prior law of this state that was in effect at the time of execution and that the testator had the requisite testamentary capacity and freedom from undue influence pursuant to section 2107.03 of the Revised Code.

Any such judgment declaring a will valid is binding in this state as to the validity of the will on all facts found, unless provided otherwise in this section, section 2107.33, or division (B) of section 2107.71 of the Revised Code, and, if the will remains valid, shall give the will full legal effect as the instrument of disposition of the testator's estate, unless the will has been modified or revoked according to law.

(B) Any declaration of validity issued as a judgment pursuant to this section shall be sealed in an envelope along

with the will to which it pertains, and filed by the probate judge or his designated officer in the offices of that probate court. The filed will shall be available during the testator's lifetime only to the testator. If the testator removes a filed will from the possession of the probate judge, the declaration of validity rendered under division (A) of this section no longer has any effect.

(C) A testator may revoke or modify a will declared valid and filed with a probate court pursuant to this section by petitioning the probate court in possession of the will and asking that the will be revoked or modified. The petition shall include a document executed pursuant to sections 2107.02 and 2107.03 of the Revised Code, and shall name as parties defendant those persons who were parties defendant in any previous action declaring the will valid, those persons who are named in any modification as beneficiaries, and those persons who would be entitled because of the revocation or modification, to inherit from the testator under Chapter 2105. of the Revised Code had the testator died intestate on the date the petition was filed. Service of the petition and process shall be made on these parties by the methods authorized in section 2107.082 [2107.08.2] of the Revised Code.

Unless waived by all parties, the court shall conduct a hearing on the validity of the revocation or modification requested under this division in the same manner as it would on any initial petition for a judgment declaring a will to be valid under this section. If the court finds that the revocation or modification is valid, as defined in division (A) of this section, the revocation or modification shall take full effect and be binding, and revoke the will or modify it to the extent of the valid modification. The revocation or modification, the judgment declaring it valid, and the will itself shall be sealed in an envelope and filed with the probate court, and shall be available during the testator's lifetime only to the testator.

(D) A testator may also modify a will by any later will or codicil executed according to the laws of this state or any other state and may revoke a will by any method permitted under section 2107.33 of the Revised Code.

(E) A declaration of validity of a will, or of a revocation or modification of a will previously determined to be valid,

given under division (C) of this section, is not subject to collateral attack, except by a person and in the manner specified in division (B) of section 2107.71 of the Revised Code, but is appealable subject to the terms of Chapter 2721. of the Revised Code.

[§ 2107.08.5] § 2107.085 Effect on other proceedings.

The finding of facts by a probate court in a proceeding brought under sections 2107.081 [2107.08.1] to 2107.085 [2107.08.5] of the Revised Code is not admissible as evidence in any proceeding other than one brought to determine the validity of a will.

The determination or judgment rendered in a proceeding under these sections is not binding upon the parties to such a proceeding in any action not brought to determine the validity of a will.

The failure of a testator to file a petition for a judgment declaring the validity of a will he has executed is not admissible as evidence in any proceeding to determine the validity of that will or any other will executed by the testator.

## APPENDIX D

## Arkansas

## Ark. Code Ann. (1987)

## Ante-Mortem Probate Act

## 28-40-201. Title.

This subchapter shall be known and may be cited as the "Arkansas Ante-Mortem Probate Act of 1979."

## 28-40-202. Action for declaratory judgment.

(a) Any person who executes a will disposing of all or part of an estate located in Arkansas may institute an action in the probate court of the appropriate county of this state for a declaratory judgment establishing the validity of the will.

(b) All beneficiaries named in the will and all the testator's existing intestate successors shall be named parties to the action.

(c) For the purpose of this subchapter, the beneficiaries and intestate successors shall be deemed possessed of inchoate property rights.

(d) Service of process shall be as in other declaratory judgment actions.

## 28-40-203. Court findings—Effect.

(a) If the court finds that the will was properly executed, that the testator had the requisite testamentary capacity and freedom from undue influence at the time of execution, and that the will is otherwise valid, it shall declare the will valid and order it placed on file with the court.

(b) A finding of validity pursuant to this subchapter shall constitute an adjudication of probate. However, such validated wills may be modified or superseded by subsequently executed valid wills, codicils, and other testamentary instruments, whether or not validated pursuant to this subchapter.

## APPENDIX E

## Uniform Ante-Mortem Probate of Wills Act

## Draft A

November 7-9, 1980

## SECTION 1. (Verification of Will; Declaration of Due Execution of a Will in Testator's Lifetime.)

(a) Venue. A testator may during his lifetime petition a court in the county of his domicile for an order *binding all interested persons other than his spouse and descendants* [declaring] that his will has been duly executed and is his valid will subject only to subsequent revocation.

(b) Petition. The petition shall contain (1) a copy of the will which the plaintiff wishes to verify, (2) an allegation that the will is in writing and was signed by the petitioner or in the petitioner's name by some other person in the petitioner's presence and by his direction and was signed by two witnesses in the presence of the testator, (3) an allegation that the instrument was properly executed with testamentary intent, (4) an allegation that the petitioner had testamentary capacity, (5) an allegation that the petitioner executed the instrument in the exercise of his own free will, and (6) an allegation that the petitioner is familiar with the contents of the instrument. The original will shall be filed with the petition.

(c) Defendants. The defendants to the proceedings shall be a representative group named from among the heirs presumptive of the plaintiff and others who, as devisees under earlier wills of the petitioner or for other reasons, appear to have some prospect of being selected as *devisees* [testamentary beneficiaries] of the petitioner. *If the heirs presumptive are the petitioner's spouse, or descendants, or both, the defendants shall be named from among those who would be the heirs presumptive if the petitioner were unmarried and without living descendant.* If [these] *the potential defendants* are not numerous, all whose interests are adverse shall be named as defendants. If they are so numerous that joinder of all is impracticable, several may be sued as representative parties on behalf of all. Before the court allows the action to proceed, if all of the heirs presumptive and devisees under earlier wills are not joined, it



shall find that the defendants will adequately protect the interest of all others adverse to the plaintiff.

(d) Service. The defendants shall be served as provided in 1- —. The court may order additional persons made defendants and served to assure the adequate representation of the interest of those adverse to the plaintiff. Interested persons, including persons named as beneficiaries of the will in suit, shall be freely allowed to intervene, and beneficiaries of the will in suit shall be made parties if the petition is opposed.

#### SECTION 2. (Hearing; Witnesses.)

(a) Hearing; Inquiry by Court. After notice, the court shall hear the testator, the attesting witnesses if available and other witnesses or relevant evidence as the testator or parties defendant may present. The court may make any independent inquiry it deems appropriate.

(b) Witnesses; Competence. Any person who is a competent witness may testify concerning any issue despite possible disqualification after the death of the testator and shall not be precluded by reason of interest.

(3)[sic] Court Witnesses. The court may call as independent witnesses, physicians, psychologists, psychiatrists, and other persons of its own choosing to examine the testator or to testify in the proceedings.

#### SECTION 3. (Order; Judgment.)

(a) If the court is satisfied that the allegations of the petition have been sustained, it shall by order declare that the testator's will has been duly executed and is his valid will subject only to subsequent revocation and shall order the will retained in custody of the court.

(b) The judgment, if for the plaintiff, shall bind the defendants and all persons whose interests they represent *but it shall not be binding on the petitioner's spouse and descendants who survive him and are otherwise not disqualified by early death, renunciation or contract to succeed to his estate*. The judgment, if for the defendants, shall be a conclusive determination that the will which was the subject of the adjudication was not a valid will.

#### SECTION 4. (Withdrawal of Will, Revocation.)

A will declared to be valid under this procedure may be withdrawn during the testator's lifetime *provided the testator*

*signs a statement of revocation to be written across the face of the will at the time of withdrawal. A request for withdrawal of a will previously adjudicated to be valid shall be made by verified application filed with the court. [Upon his verified application filed with the court and when so withdrawn shall be deemed revoked.] A will declared to be valid hereunder may also be revoked or modified by a subsequent [written] will or codicil though the court is not informed thereof.*

## APPENDIX F

## Uniform Ante-Mortem Probate of Wills Act

## Draft B

November 7-9, 1980

**SECTION 1.** (Application for Ante-Mortem Verification of Will; Declarations Regarding Due Execution of Will During Testator's Lifetime.)

(a) **Venue.** During his lifetime a testator may apply to a court in the county of his domicile for a determination that his will has been duly executed and is his valid will subject only to subsequent revocation.

(b) **Contents of Application.** The application shall contain a copy of the will that the applicant wishes to have verified and shall include the following allegations: (1) that the will is in writing and was signed by the applicant or in the applicant's name by some other person in the applicant's presence and by his direction and was signed in the presence of the testator by two persons each of whom witnessed either the signing or the testator's acknowledgement of the signature or of the will; (2) that the instrument was properly executed with testamentary intent; (3) that the applicant executed the instrument in the exercise of his own free will; and (5) [sic] that the applicant is familiar with the contents of the instrument.

The original will shall be filed with the application, but neither the original nor any copy thereof shall be available for inspection by any person other than the Court except as the Court in its discretion shall determine to be necessary and proper.

**SECTION 2.** (Procedure; Appointment of Special Master.)

(a) **Qualifications.** Upon the filing of an application, the Court shall appoint a special master to assist the Court in making determinations regarding due execution of the will. The master shall be a qualified attorney having no interest in verification of the will.

(b) **Powers and Duties.** The master shall interview the testator outside the presence of the attorney who prepared the will. He shall also interview members of the testator's family, other relatives and friends of the testator, or any other indi-

vidual as the Court shall direct him. The Court may delegate to the master such powers of investigation, including the right to have any relevant documents produced, as it shall deem appropriate under the circumstances. Following completion of his investigation, the master shall submit to the Court a written report detailing his findings. This report shall not be available for inspection to anyone other than the Court.

### SECTION 3. (Procedure; Hearing.)

(a) Hearing; Inquiry by Court. The Court may, if it deems appropriate, schedule a hearing at which to interview the testator, the attesting witnesses if available, and any other witnesses or relevant evidence. The testator shall at all times be represented by counsel of his own choice or by court-appointed counsel.

(b) Witnesses; Medical Examination. The Court may call as witnesses physicians, psychologists, psychiatrists, and other persons of its own choosing to examine the testator or to be interviewed by the Court. All interviews shall be conducted at a closed hearing.

### SECTION 4. (Determination on Application.)

If the Court is satisfied that the allegations of the application have been sustained, it shall issue a written determination that the testator's will has been duly executed and is his valid will subject only to subsequent withdrawal of the will or revocation and shall require the will retained in the custody of the Court.

### SECTION 5. (Effect of Determination; Necessity of Post-Mortem Proceedings to Probate.)

(a) Notwithstanding any other provision of this Act, the determination of validity of a will during the testator's lifetime under this procedure shall be conclusive and binding on all persons. Any will which has been the subject of a determination of validity under this procedure shall not be subject to subsequent contest by any person except on the ground of subsequent revocation.

(b) Unless subsequently withdrawn or revoked by the testator, any will which has been the subject of a determination of validity under this procedure shall be deemed to have been probated and no proceedings to probate such a will shall be necessary after the death of the testator, except for pur-

poses of determining whether such a will has been subsequently revoked or modified.

**SECTION 6. (Withdrawal of Will; Revocation.)**

A will determined to be valid under the procedure may be withdrawn during the testator's lifetime provided the testator files with the Court written notice of his withdrawal or revocation. Upon filing such notice with the Court, the will previously determined to be valid shall no longer be deemed his valid will. A will previously determined to be valid hereunder may also be revoked or modified by a subsequent will or codicil though the Court is not informed thereof.

**SECTION 7. (Compensation and Expenses.)**

The special master and any physician, psychologist, psychiatrist, or other person employed by the Court or the special master hereunder are entitled to reasonable compensation. The testator shall be responsible for expenses associated with these proceedings.